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THE
Grounds and Maxims,
AND ALSO
AN ANALYSIS
OF THE
ENGLISH LAWS.

By WILLIAM NOY, Esq.

OF LINCOLN'S INN:

Attorney General, and of the Privy Council to King
Charles the First.

TO WHICH IS ANNEXED,

A TREATISE OF ESTATES,

By Sir JOHN DODERIDGE, Knt.

AND

OBSERVATIONS ON A DEED OF FEOFFMENT,

By T. H. Gent.

THE SIXTH EDITION,

With Notes and References; and other considerable Additions
and Improvements,

By CHARLES BARTON,

OF THE INNER TEMPLE, ESQ.

London:

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TO THE
PRESENT EDITION.

THE eminent reputation which the *Maxims of Noy* have maintained, from so early a period as the reign of Charles II. to the present time, has rendered their merit unquestionable; and *five* ample impressions are at length become insufficient to supply the demands of the profession; no apology therefore is necessary for presenting the Public with a *sixth*. To this edition particular attention has been paid, and such improvements have been attempted, as, it is hoped, will meet with professional approbation.

Since the first publication of the work, considerable changes have taken place in the laws of England. The ancient tenures, with their feudal clogs and appendages, have been either abolished by the legislature, or suffered gradually to give place to a freer circulation of property: innumerable acts of Parliament, and resolutions of the Courts, have altered the law in various particulars; but, strange as it may appear, none

of these alterations are noticed in any preceding edition. So material an omission required the Editor's first attention.

The changes which the Law has undergone since the first publication of the work, have, therefore, been adverted to, either in notes distinct from the text, or in remarks distinguished by Italic characters.

Notwithstanding the general merit of the work, the reader will perceive it to be sometimes deficient in method, and exceedingly unequal and disproportionate in its different parts. To remedy these defects, as far as it could be done without altering the text, or enlarging the work,

References have been subjoined at the foot of each chapter to books and cases of authority, where the subject is more elaborately discussed, or more methodically treated.

The Editor would think himself unworthy to be of the profession to which he belongs, if he felt the smallest inclination unjustly to depreciate the labours of his predecessor, whose wishes to benefit the profession were possibly as ardent as his own; but the extreme incorrectness of the last edition has obliged him, in numerous instances, to sacrifice his private feelings to what he conceived to be for the public advantage.

Thirdly, therefore, the additions made by the last editor have been attentively considered, and materially altered—many of them have been transposed, some of them new-modelled, and some expunged;

new

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new cases have also been substituted in the room of those which were thought inapplicable—these are printed in Italic characters.

The Editor desires, however, to assure the profession, that none of these alterations have been made without mature consideration, and it is hoped, therefore, not without evident necessity.

The typographical errors of the last edition were also found to be exceedingly numerous; and though the Editor dare not venture to assert that all of them are now expunged,* yet so many have been detected as to afford him a reasonable hope, that no considerable number has escaped his observation.

Lastly, A new Table of Contents has been added; the Table of Maxims alphabetically arranged; and the Index to the principal matters considerably enlarged.

That all the additions and alterations of the present Editor were necessary, he presumes no one in possession of the old editions will deny, he rather fears it may be thought by some that *more* might have been done. It has been suggested to him, that the work would have been rendered still more useful, had the reasons occasionally been adduced on which the grounds and maxims of the author

* What is printed as Max. 30. in p. 25. was originally, perhaps, no more than an example to the preceding maxim; on the other hand, the line immediately following "Law
"Constructions," p. 31, was probably intended as a maxim; there are some other instances of this sort, which the Editor could not procure sufficient authority to correct.

are founded, and the exceptions to the general rules been instanced by examples. But the Editor is of a different opinion. To have done all this, so much additional labour must have been bestowed, and so much new matter introduced, that the work could no longer have maintained its present form, nor have been afforded for the moderate price it now bears. It may be remarked too, that to have added the reasons on which the maxims are founded, would have been to deprive the student of his most valuable, if not his only source of improvement. Legal knowledge can be obtained only by painful inquiry; by thinking, reasoning, and investigating; by tracing theorems to their principles, and adducing principles from established resolutions; to have done for the student what he ought to do for himself, might render his studies pleasanter, but it would also render them ineffectual.

Upon the whole, the Editor has endeavoured to do all that on an attentive perusal appeared to be absolutely necessary, and no more. Whether he has successfully executed his intentions, it better becomes others to say than himself; he hopes that he has not exceeded them; for in editing an approved work, he thinks it invariably better to do too little than too much: omissions will frequently be supplied by the judgment of the reader; but the effects of redundancies, increase of price, and consumption of time, no efforts of his can easily repair.

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* * * The additions made by the last and present Editor, have rendered a double paging necessary for the convenience of the student, who would otherwise frequently be obliged to cast his eye over several pages to find the matter referred to by the Index.

Gloucester Street, Queen Square, }
Easter Term, 1794. }

— E R R A T A.

After note 1, p. 60, add "except tenures in frankalmoign, copyholds, and the *honorary* services of grand serjeantry."

The *marginal* paging from 113 to 117, and from 119 to 134, is omitted; but as it was so in the last edition, it could not with propriety have been corrected.

INTRODUCTION to the *Matters contained*
in the following Treatise.

(Prefixed to the former Editions.)

A Summary of the whole Law, divided into
the Laws of Reason, Custom, and Sta-
tutes.

What things these laws chiefly concern, as
men's possessions of chattels and lands, wherein
some have fee-simple, fee-tail, estate for life, for
years, at will, remainders and reversion; and the
remedies against them that wrong them in those
estates.

Of whom lands are holden, by what service,
what advantage the lord and guardian shall have
by their tenure; as ward, relief, and marriage.

Of rent, common of pasture, way, and liber-
ties in lands.

Of chattels real and personal, and things be-
longing thereunto.

How estates in land and chattels may be con-
veyed and assured, by what deed or writing, as by
feoffment with livery of seisin, &c.

Also of bargaining, selling, restoring, &c.

How these things may be left by will to our heirs, executors, &c.

And as controversies do often arise, I have set down how they may be quietly ended.

These grounds and maxims were originally written in *French*; and although they may lose some of their beauties by being translated, sufficient amends will be made by their being more universally understood in the *English* language.

Since the Publication of the first Edition,
there has been added,

An ANALYSIS of the LAW;

A TREATISE of Particular ESTATES,

By Sir John Doderidge, Knt.

AND,

Observations on a DEED of FEOFFMENT,

By T. H. Gent.

AND IN THIS EDITION,

A TRANSLATION of the LATIN MAXIMS,

And considerable ADDITIONS under every
Maxim, distinguished by this Mark. †

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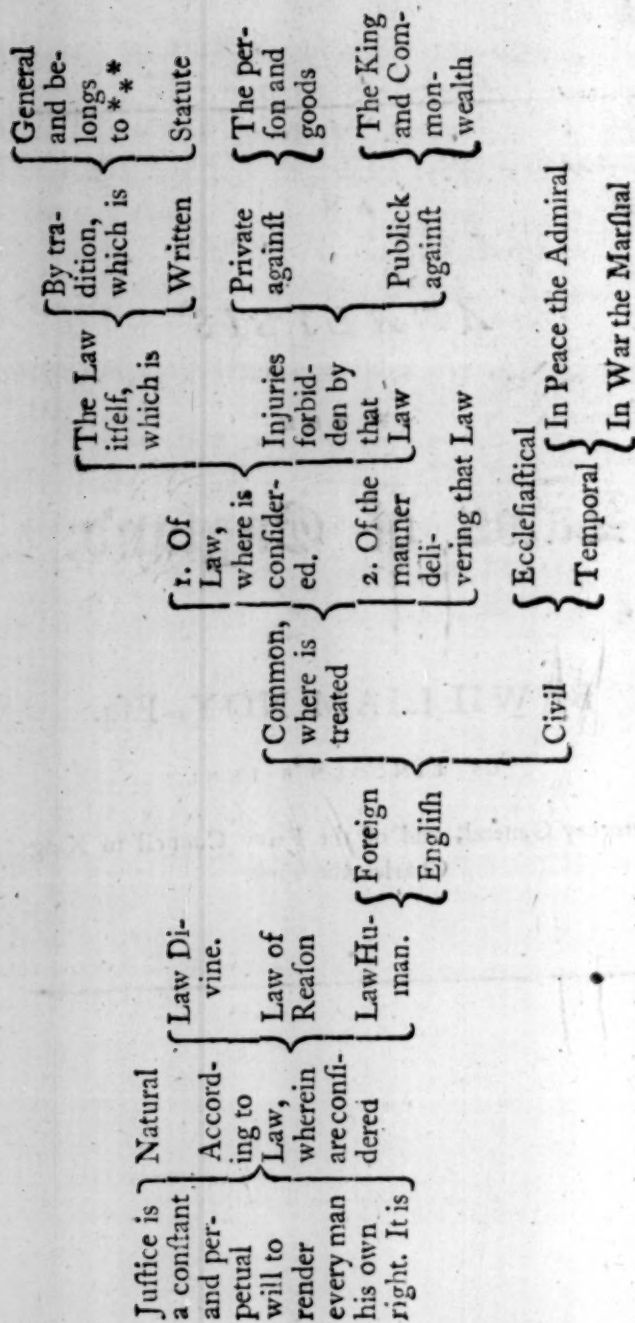
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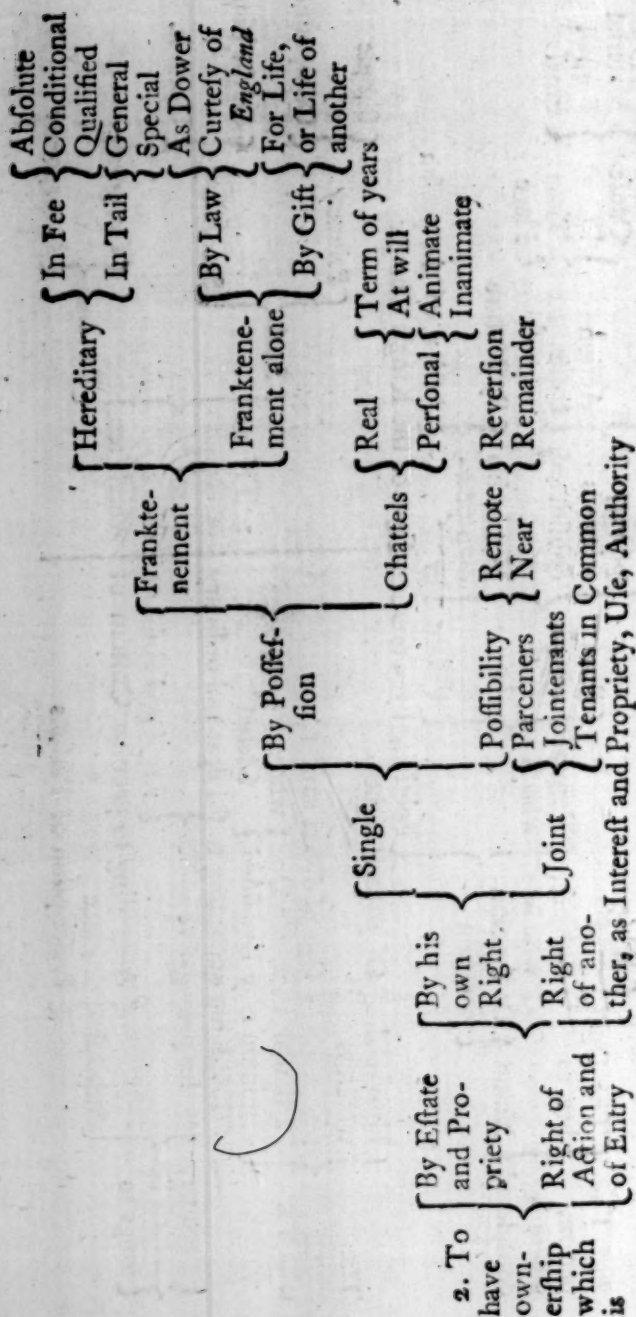
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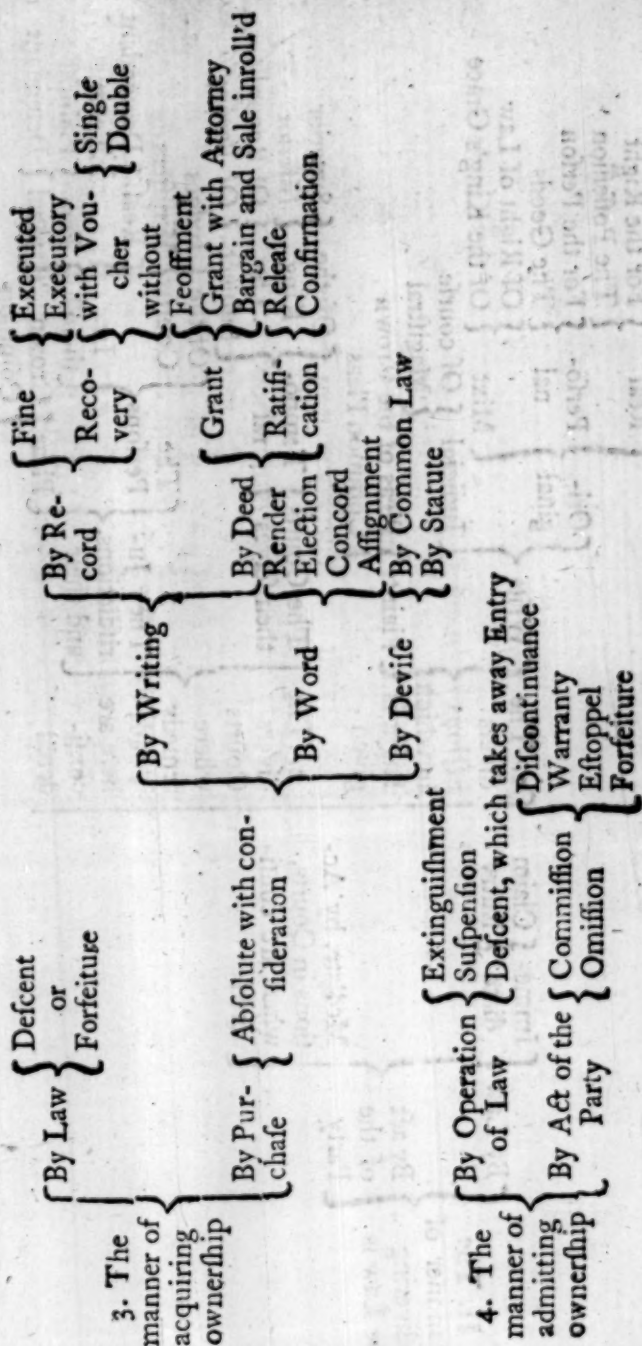
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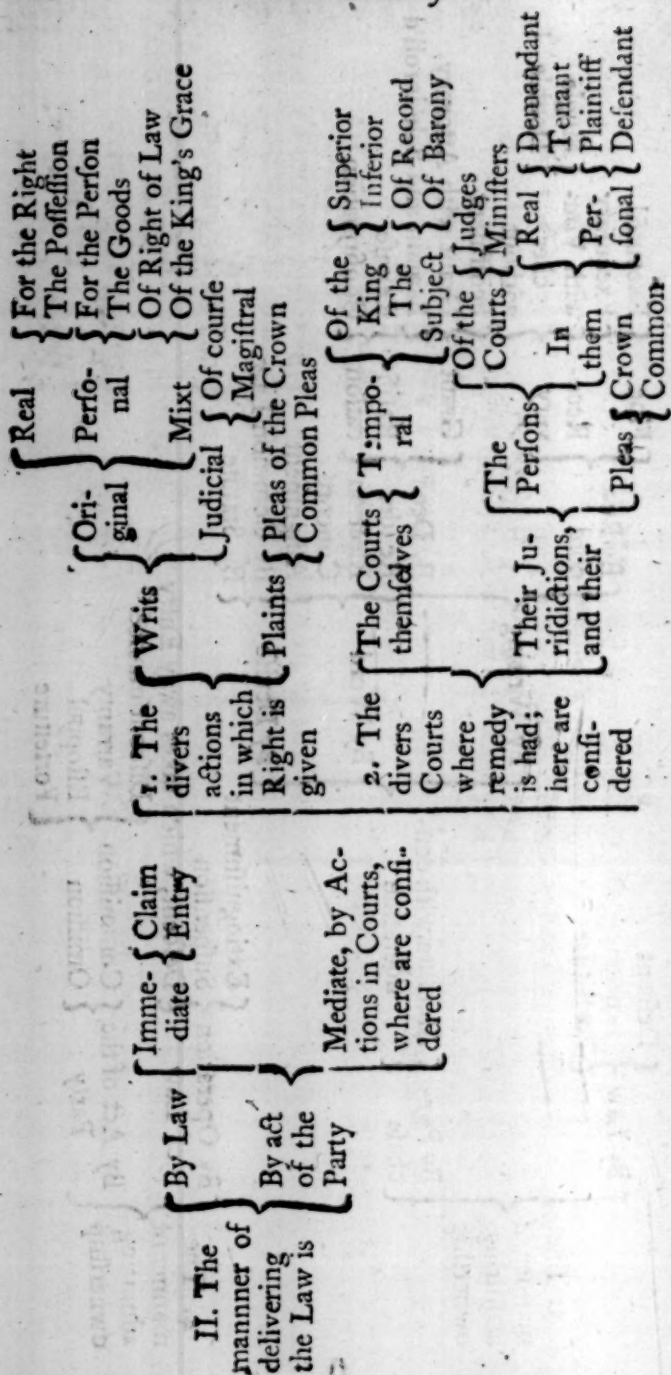
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the President
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 at Washington

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CHAP. I.

The Laws of *England* are threefold; [1]
Common Law, Customs, and Statutes.

THE common law is grounded on the rules of reason, and therefore we use to say in argument, that reason will that such a thing be done; or, that reason will not that such a thing be done. The rules of reason are of two sorts, some taken from learning as well divine as human, and some proper to itself only.

OF THEOLOGY.

1. *Summa ratio est, quæ pro religione facit.*

5 Co. 14.

Religion is one of the chief objects in the law.

Where the condition of a tenure is to find a preacher, though the lord purchase parcel of the land, yet the whole service remains, because it is for the advancement of religion.

+ If an act be made directly contrary to the law of God, as for instance, if it be enacted

B

that

that no one shall give alms to any object in never so necessitous a condition, such an act is void. *Doct. and Stud. lib. 1. cap. 6.*

† Regularly statutes do not bind the King unless he be particularly named, yet he is included within the general words of 13 Eliz. c. 10. (prohibiting ecclesiastical persons from alienating their Livings) because it was made in furtherance of religion. 2 Co. 44. b.

On the principle of this maxim are also founded the several acts of parliament inflicting penalties on the exercise of noisy and indecent sports, such as bull-baiting, &c. on a Sunday. 1 Car. 1. &c.

The exposure of goods to sale on a Sunday is prohibited by 29 Car. 2. c. 7. on a like principle; for though this might contribute to the convenience of some individuals, yet the public observance of religion is a matter of higher importance than private accommodation. Vid. 1 Haw. P. C. 11. 3 Burn J. 106. (1)

[2] 2. *Dies dominicus non est juridicus.* 1 Inst. 135.

Sunday is no day in law.

Sale on a Sunday shall not be said to be sale in a market; to alter the property of the goods.

(1) Some exceptions however are admitted to this as well as to most other maxims of law, when any serious inconvenience would result from a rigid observance of them; thus the same Stat. of 29 Car. 2. does not extend to the dressing of meat in families, inns, or victualling-houses, or to the sale of the necessary article of milk; mackerel are also by a subsequent act allowed to be sold on a Sunday, on account of the perishableness of their nature.—In conformity to what appears to have been the author's opinion, the editor has in general omitted to notice these exceptions as unnecessary in a work of this nature.

† If

† If a fine be levied with proclamations according to the statute of 4 *H. 7. cap. 24.* if any of the proclamations be made on a *Sunday*, all the proclamations will be erroneous, because the judges cannot sit on a *Sunday*, for this day is exempt from such business by the common law, by reason of the solemnity of it, in order that all mankind may apply themselves to their devotions, and the honour of God. *Finch Law. 7.*

† If the teste of a writ of *Scire facias* be on a *Sunday*, it is error, because it is not a day in bank. *Dyer 168.*

† If any part of the proceedings of a suit in any court of justice be entred and recorded to be done on a *Sunday*, it makes all void. 2 *Inst. 264.*

Where a writ or summons in a common recovery was made returnable on a day which happened to fall on a Sunday, and the voucher died on the Monday, the judgment was reversed, because it could not have been given till the day after his death. 3 Bur. 159.

So neither can a writ of enquiry be executed on a Sunday, 1 Stra. 387. nor any other civil process. 5 Anne, c. 9. (2) Vid. also 1 Atk. 58. 1 T. R. 265.

OF GRAMMAR.

Of grammar, the rules are infinite in the etymology and construction of words; a word has its natural signification when it stands alone.

(2) This does not extend to proceedings in criminal cases, for by this act as well as by 29 *Car. 2. c. 7.* process for treason, felony and breach of the peace, are allowed to be served on a *Sunday*, criminals might otherwise escape the justice of the laws.

3. *Ad proximum antecedens fiat relatio, nisi impediatur sententia.* Jenk. Cent. 180.

The antecedent refers to the next relative, unless it obstructs the sentence.

As an indictment against *J. S.* servant to *J. D.* in the county of *Middlesex*, butcher, &c. is not good; for servant is no addition, and butcher shall be referred to *J. D.* which is the next antecedent.

† An indictment that *Elizabeth* was in peace, &c. till *A.* the husband of the aforesaid *Elizabeth* of *D.* in the county of *S.* yeoman, murdered her, is good; for yeoman is an addition for the man only, and therefore the term must necessarily refer to the husband; but an indictment against *Alicia S.* of *D.* in the county of *S.* wife of *J. S.* spinster, &c. is not good, for spinster being an indifferent addition for man or woman, should refer to *J. S.* which is the next antecedent, and so the woman has no addition. *Dyer* 46. b.

Sir Thomas Cheyney devised to H. his son, and to the heirs male of his body—Remainder to Thomas Cheyney of D. and the heirs male of his body, upon condition that he or they or any of them should not discontinue. It became a question whether H. the son was included within the words he or they, and it was resolved that they did not, but to Thomas Cheyney of D. and the heirs male of his body. This sentence being the last antecedent. 5 Co. 68. Cheyney's Case, Vid. also 2 Haw. P. C. c. 23. s. 104.

OF LOGICK.

4. *Cessante causâ cessat effectus.* 11 Co. 49.
Plowd. Com. 268.

When the cause ceaseth, the effect also ceaseth.

Neither the executor, nor the husband, after the death of a woman guardian in socage, shall have the wardship, because the natural affection is removed which was the cause thereof. *Finch* 9.

† It is no principal challenge to a juror that he has married the party's mother, if she is dead without issue, for the cause of the favour is removed. *Co. Lit.* 157.

† If the conusor in a statute-merchant be in execution and his lands also, and the conusee release to him all debts, this shall discharge the execution; for the debt was the cause of the execution, and of the continuance of it until the debt be satisfied; therefore the discharge of the debt, which is the cause, discharges the execution which is the effect. *Co. Litt.* 76.

† Upon a divorce, the woman shall have the goods given in marriage, not being spent: for the goods were given in advancement of the woman, and therefore it is reasonable that she should have them, in that the cause and consideration of that gift is now defeated; for the cause ceasing, the effect also ceaseth. *Dyer* 13, 61.

† The original cause of an amercement being pardoned, the amercement is pardoned: And if a man wound another the first day of *May*, and the King pardon him of all felonies and misdemeanors, the second day of *May*; but the party dies of his wounds the third day of *May*, so as this is no felony 'till after the pardon, yet the felony is pardoned; for the

misdemeanor being pardoned, all things ensuing thereupon are also remitted. *Co. Litt.* 5. 59.

Though the general rule of law is, that a husband shall be answerable for the debts contracted by his wife, yet if they be legally separated, or if the wife carry on a sole trade, as by the custom of many places she may, the husband is no longer liable, for cessante causa cessat effectus. Vid. 2 Blac. Rep. 1179.—1 T. R. 5.—Cook. B. L. 36.

If lessee commit waste, no action will lie if the thing wasted be repaired before the commencement of the action, because the cause of the action has ceased. Co. Lit. 204.

5. *Some things shall be construed according to the original cause thereof.*

[3] The executor may release before the probate of the will, because his title and interest is by the will, and not by the probate.

To make a man swear to bring me money upon pain of killing, and he bringeth it accordingly, is felony. *Vid. 1 Haw. P. C. 96.*

Outlawry in trespass is no forfeiture of land, as outlawry of felony is; for although the non-appearance is the cause of the outlawry in both, yet the force of the outlawry shall be esteemed according to the heinousness of the offence, which is the principal cause of the process. *Vid. Plow. 541.—Co. Lit. 128.*

† So where two persons fight after a former quarrel, it shall be presumed to be out of malice from the first falling out. *Finch 10.*

If judgment be had, or a fine levied, in pursuance of an usurious or unlawful contract, it may be avoided by averring the corrupt agreement. 2 Haw. P. C. 240.

A man

A man non compos shall not be punished for an offence against the laws, because his madneis and not his intention was the cause. 2 Co. 124.

If a man illegally detained in confinement, in order to obtain his liberty promises an obligation at a future time and perform it accordingly; yet it shall be void. Finch 10.

6. *Some things shall be construed according to the beginning thereof.*

As if a servant, which is out of his master's service, kill his master, through the malice which he bare him when he was his servant, this is petty treason. *Vid. Plow. 260. 1 Haw. 88.*

† So if I make a feoffment in fee, upon condition that the feoffee shall enfeoff over, and the feoffee be disseised, and a descent cast, and then the feoffee bind himself in a statute, which statute is discharged before the recovery of the land, this is no breach of the condition, because the land was never liable to the statute, and the possibility that it should be liable upon the recovery, the law doth not respect. *Pilkington and Winnington, 2 Co. 59.*

† If a lease for years be made rendering a rent, and the lessee make a feoffment of part, and the lessor enter, the immediate cause is from the law in respect of the forfeiture, though the entry be the act of the party; but that is but the pursuance and putting in execution of the title which the law giveth, and therefore the rent or condition shall be appointed. *Dyer 4 b.*

† And therefore if a feme covert be disseised, and the baron dieth, and she take a new husband, and then the descent is cast: or if a man that is not *infra 4. Mariae*, be disseised, and he return into *England*, and go over sea again, and then a

descent is cast, this descent bindeth because of the *interim* when the persons might have entred, and the law respecteth not the state of the person at the last time of the descent cast, but a continuance from the very disseised to the descent. *Dyer* 143. b. 144. a.

Though tenant after possibility of issue extinct, be but a tenant for life, yet in respect of the inheritance having been once in him, the law allows greater privileges to his estate than to that of a mere tenant for life. Co. Lit. 28. a.

The King being seised in fee of a manor, a stranger erected a shop on it, without paying rent to the crown for it; the manor was afterwards granted in fee to the Earl of Leicester, who neither entered or took rent for it; the occupier died in possession, and his son entered as heir to his father; this was held to be no descent to take away the grantee's right of entry, for nothing was gained against the King by erecting the shop. Dyer 266. Vid. more illustrations of this max. Bac. El. p. 35.

7. *Some things shall be construed according to the end thereof.*

As if a man warned to answer a matter in a writ, there he shall not answer to any other matter than is contained in the writ, for that was the end of his coming. *Vid. Co. Lit. 1. 3.*

+ *Vouchee comes into court to be viewed, and being viewed is adjudged of full age, yet he shall not be compelled to answer till he comes in for the same purpose by another process. Finch 13.*

If a man be outlawed in a personal action by process on original, and bring a writ of error, and he who outlawed him plead against him a release

release of all actions personal, yet it seems to be no plea; for the end of the writ of error is only to revive the outlaw. Co. Litt. 288. b.

Acts of Parliament shall be construed according to the end and intent for which they were passed, and not according to the letter (except, indeed, penal acts, which are strictly construed in favorem vite, as, if an act be made that whoever commits such an act shall be guilty of felony; yet if it be done by a person of insane memory, by an infant within age of discretion, &c. such shall not incur the penalties of the act, because they come not within the intent of the legislature. Plow. Com. 465. a.

The law allows a man to enter a tavern, the lord to distrain, a reverser to view if waste made, &c. yet if he that enters a tavern commits a trespass, or he stays the distress, &c. the law will judge from the subsequent act that they entered for that purpose, and they shall be trespassers from the beginning. 8 Co. 146. b.

8. *Derivativa potestas non potest esse major primitiva.*

The derived power cannot be greater than the primitive one.

[4]

A servant shall be stopped to say the franktenement is belonging to his master, by a recovery against his master, although the servant be a stranger to the recovery; for he shall not be in a better case than he is in, whose right he claimeth or justifieth.

Where lessee opened a coal mine in land demised to him, and assigned over his term, the assignee could not work the mine, because the lessee having no right could not assign any, the land only having been assigned to the lessee. Co. Lit. 321. 5 Co. 113.

A copyhold estate is so established by the custom
B 5 *that*

that it shall not be destroyed though it be severed from the manor; for as the lord himself cannot oust a copyholder, much less shall one who claims under him. 4 Co. 24. b.

9. *Quod ab initio non valet, in tractu temporis non convalescit.*

That which was not originally of force will not avail by length of time.

If an infant or a married woman make a will, and publish the same, and afterwards dieth, being of full age or sole, notwithstanding this is void. *Vid. 4 Co. 61.*

† If a man seised of lands in fee make a lease for twenty-one years, rendering rent to begin presently, and the same day he makes a lease to another for the like term, the second lease is void; and if the first lessee surrender his term to the lessor, or commit any act of forfeiture, &c. of his lease, the second lessee shall not have his term; because the lessor at the making of the second lease, had nothing in him but the reversion. *Plowd. 432.*

† A bishop makes a lease of lands for four lives, which is contrary to the statute, though one of them dies in his life-time, so as now there be but three, and afterwards he dieth, yet it shall not bind the successor; for those things which have a bad beginning cannot be brought to a good end. 10 Co. 62.

† So a remainder limited to *A.* the son of *A. B.* having no such son, and afterwards a son is born to him, whose name is *A.* during the particular estate, it is void. *Doder. Eng. Law. 233, 234.*

† A feme covert gives lands devisable by the common law, and publishes her will; afterwards the baron dies, and after this the wife dieth, the devise

devise is void, because the foundation, *viz.* the making and publishing are void; and death without a good beginning gives no effect. *Plowd.* 344.

† If a fine be levied without any original it is voidable, but not void; but if an original be brought, and a *Retraxit* entered, and after that a *Concord* is made, or a fine levied, this is void, in respect the truth appeareth on record. *Co. Lit.* 352. *b.* *Vid. also Doug.* 660. *1 Blac. Rep.* 562. *3 Bur.* 1692. 1742.

10. *Unumquodque dissolvitur eo modo quo colligatur.*

Every thing is dissolved by the same means it is constituted.

An obligation or other matter in writing may not be discharged by an agreement by word, but by writing. *Vid. Co. Lit.* 121. *b.* *2 Ch. Ca.* 180.

† As no estate can be vested in the King without matter of record, so no estate can be divested out of him but by matter of record. *Plowd.* 533.

† In case of attainder and office, the King is entitled by double matter of record; and therefore if the party be aggrieved, he ought to avoid it by double matter of record. *4 Co.* 57.

† An act of parliament cannot be avoided but by parliament; and an use which is raised by declaration and limitation, may cease only by words of declaration and limitation. *Bacon's Read. Stat. Uses.*

† Indentures being made for declaring the uses of a subsequent fine, recovery, &c. are only a directory, and do not bind the estate or interest of the land; yet if the fine or recovery, &c. be pursued according to the indentures,

there cannot be any bare averment, that after the making of the indentures, by mutual agreement of parties it was agreed that the assurance shall be to other uses; but if other limitation of uses be made by writing or matter of so high a nature as the former, then the last agreement shall stand; for every contract and agreement must be dissolved by a matter of as high a nature as the other was. 5 Co. 26. and *Suprema potestas se ipsam dissolvere potest*. (A matter of the highest nature may dissolve itself.)

So remainders, reversions, rents, advowsons, and other things which lie in grant; as they cannot be granted without deed, so they cannot be surrendered without. Co. Lit. 338. a.

II. *He that claimeth a thing on high,*
Shall neither have gain nor loss thereby.*

[5] As if one jointenant make a lease of his jointee, reserving rent and die; the heir which surviveth shall have the reversion of his jointee, but not the rent, because he cometh in by the first scoffor, and not under his companion. *Vid. Dy. 187.*

Also where the husband being leased for years in right, reserving rent, the woman shall have the residue of the term, but not the rent.

† An executor recovers and dies intestate, administration of the goods of the first testator is committed to J. S. J. S. shall not sue out execution upon this recovery. *Finch 13.*

† Dower cannot be assigned reserving a rent, or with a remainder over, for she is in by the husband, and not by him who assigns the dower. *Ibid.*

* i. e. He who claims by a paramount title.

If a man devise a term to J. S. and the executors of the testator agree that he shall have it on condition. J. S. shall nevertheless have it absolutely; for after the assent of the executors he is in by the devise. 8 Co. 28. b. Westwick's Case.

If a copyholder surrender his estate to the use of one for life, and the lord admit him to hold to him and his heirs; yet he has but an estate for life, because he is in by the surrender. 8 Co. 29. a. Bunting's Case.

12. *Debile fundamentum, fallit opus. 3 Co. 231.*

A weak foundation destroys the superstructure.

When the estate whereunto the warranty annexed is defeated, the warranty is also defeated.

† A spiritual corporation (to which the Church is appropriate) being dissolved, the Church is disappropriated. 3 E. 374.

† The lord confirms the estate of the disseisor to hold free, this after the recovery of the disseisee shall be antient demesne again, for the estate (upon which the confirmation enures) is defeated. 49 E. 3. 8.

All proceedings are void when the writ or process whereon they are founded has been erroneous. Dy. 223. 4 Bur. 2560.

An action of debt, &c. brought by an outlaw is nugatory, because by outlawry his right to bring actions is forfeited. Co. Lit. 286.

13. *Incidents may not be severed.*

As if a man grant wood to be burnt in such a house, wood may not be granted away, but he which hath the house shall have the wood also. 27 E. 4. 11. b.

If

If a manor be leased with an exception of the services, the exception is void; for services are incident to the manor. Dyer 97.

If a lease be made to a man reserving rent, and the lessor grant the reversion to another, the rent passes to the grantee although no mention be made of it in the deed, rent being incident to the reversion. Co. Lit. 317. a.

14. *Actio personalis moritur cum personâ.* Bacon.

A personal action dies with the person.

As if battery be done to a man, if he that did the battery, or the other die, the action is gone. *Vid. 6 Mod. 126.*

If the lessor covenant to pay quit-rents during the term, his executor shall not pay it, for it is a personal covenant.

† If a lessee for years commit waste, and dies, no action of waste will lie against his executor or administrator for waste done before their time. *Co. Litt. 53.* So if the tenant commits waste, and he in the reversion dies, the heir shall not have an action of waste for the waste done in the life of his ancestor; nor shall a Parson for waste done in the life-time of his predecessor. *Co. Litt. ibid.*

† If a woman tenant for life take husband, and the husband doth waste, and the wife dies, no action of waste lies against the husband in the *Tenuit*, for he was seised but *in jure uxoris*, and his wife was tenant of the freehold; but if a feme be possessed of a term for years, and take husband, and the husband doth waste, and the wife dieth, the husband shall be charged in an action of waste, for the law giveth the term to him. *Co. Litt. 54.*

† An

† An action of debt lieth not against executors upon a contract for the eating and drinking of the testator; for that action dieth with him, because the executors cannot wage their law as their testator might have done. 9 Co. 87. *Vid. also 2 Mod. 268. Dy. 14. (3)*

15. *Things of a higher nature, determine things of a lower nature.*

As matters of writing determine an agreement by words.

If an offence which is murder at the common law, be made high treason, no appeal lieth for it; for that the murder is drowned, and punishable as treason, whereof no appeal lieth. *Vid. Dy. 50.*

† Where a man has liberties by prescription, and afterwards takes a grant of them of the king by patent, this determines the prescription; for matter of writing determines matter in pais. *Finch 22.*

† A man is bound to take his remedy upon his highest security. As for instance; Suppose a man has an *assumpsit*, and a deed under hand and seal, in case he proceeds upon the *assumpsit* he will be nonsuited. 2 *Stra. 1027. Bulstrode v. Gilburn. Vid. also Co. Litt. 115. a. 5 Co. 41. a.*

16. *Majus continet minus.* Jenk. Cent. 208. 4 Co. 46.

A greater contains a less.

(3) This maxim cannot however be applied to every species of personal actions, but in general to those only which arise from an injury actually done by the defendant, as battery, trespass, &c. and not for breach of promise or the like, when the right descends to the representatives of the plaintiff. *Vid. 3 Blac. Com. 302. Cow. 374.*

Where

Where by the custom of the manor a man may devise for life, he may devise to his wife *durante viduitate*.

† By pardon of murder, manslaughter is pardoned: and if an action of battery be brought, and the evidence proveth it maim, it is well; because it is battery and more. 31 *Aff. pl. 1.*

† Where there is a custom that a man shall not devise his lands for any higher estate than for life; yet if the devise be in fee, and the devisee claims but for life, the devise is good. When more is done than ought to be done, that seems to be done which was to be done: So that if a man tender more money than he ought to pay, it is good enough; for every greater contains the less; and the other ought to accept so much of it as is due to him. 5 *Co. 11.*

When the custom of a manor authorizes the grant of lands in fee simple, a grant of them for life or years is good. 4 *Co. 23.*

An exclusive appointment to one relation is good under a power of appointment to and amongst such of the testator's relations as should be living at the time of his death. 1 *T. R. 432.* and 435. n.

17. *Majus dignum trahit ad se minus dignum.*
1 *Inst. 43.* 4 *Inst. 66.*

The more worthy draws the less worthy along with it.

As the writings, the chest or box they are in.
v. 2 *Ver. 516.*

Where a matter extends as well into a place within the jurisdiction of the common law, as into a place within a franchise, it shall be tried at the common law. *Co. Litt. 125. b.*

The

OF PHILOSOPHY. 17

The right of possession shall draw with it the right of property. Ibid. 266. a.

If a man bargain and sell a manor with all trees growing thereon, and the manor do not pass on account of the Bargain and Sale not being enrolled, neither shall the trees pass, though as to them no enrollment is necessary. 11 Co. 48.

OF PHILOSOPHY.

18. *Naturæ vis maxima.* 3 Inst. 564. Bract. c. 23.

The force of nature is the greatest.

Natural affection or brotherly love are good causes or considerations to raise an use.

And one brother may maintain a suit for another. *Vid. 1 Haw. P. C. 252.*

† If the son be attainted, and the father covenants in consideration of natural love to stand seised of land to his use, this is a good consideration to raise an use; because the privity of natural affection remaineth. And if a man attainted, obtain a charter of pardon, and be returned on a jury between his son and another, the challenge remains; for he may maintain any suit of his son though the blood be corrupted. *Bract.*

† If the father be slain, the son shall have appeal; for it shall be presumed he had the greatest love and affection for his father, and will be most earnest in avenging his death. And it was an ancient usage when a person was found guilty of murder on an appeal, that all those of the blood of him that was slain, should draw the criminal to the place of execution: which was grounded upon the loss that they

they of the blood had received by the murder of one of them. *Plowd. Com.* 304, 306.

A devise to provide for one's children, &c. are good considerations to raise an use, Co. Litt. 21.

A statute making it felony for any one to entertain persons guilty of treason, &c. shall not extend to a wife who shall entertain her husband.
1 *Haw.* 2, 93.

19. *The law favoureth some persons, viz.*

[7] Men out of the realm or in prison, women married, infants, ideots, madmen, men without intelligence, strangers that are neither parties nor privy, and things done in another's right.

A descent shall not take away the entry of a man out of the realm, or in prison, or of a married woman, or of an infant. *Vid. Co. Litt.* 245.

And a lease made to the husband and wife. after the death of the husband, the wife shall not be charged for waste, during the marriage. *Vid. Co. Litt.* 54. a.

An ideot shall not be compelled to plead by his guardian or next friend, but shall be in the court; and he that pleadeth the best plea for himself shall be admitted.

If a dumb man bring an action, he shall plead by his next friend.

If a lessee for years grant a rent-charge, and surrendereth, the rent shall be paid, during the term, to the stranger.

A man outlawed or excommunicated, may bring an action as an executor.

If any one compasses the death of the King, the very intent is treason. Co. Litt. 133. b.

Though the wife of a common person, being an alien, shall not be endowed; yet the wife of the King

King shall though an alien born. Co. Litt. 31. b.
vid. also Finch L. 86.

20. *The law favoureth a man's person before his possession.* Finch 29. f. 34.

Menace of corporal pain shall avoid a deed, but not his goods.

† An idiot, one *non compos mentis*, or a lunatic, shall not avoid his own deed, be it executed in person, or by attorney, inasmuch as he cannot stultify himself; but he shall not lose his life for felony or murder. 4 Co. 124.

† A villain fet free for an hour will be always free. Dyer 59. b.

Fear of death, imprisonment, &c. will excuse a man from going upon his land to make his claim. But the fear of having his goods destroyed or his house burnt will not. Co. Litt. 246. a.

21. *And matter of possession more than matter of right, when the right is equal.*

As if a man purchase several lands at one time, held of several lords by knight service and dieth, the lord which first seisseth the ward shall have it, otherwise the elder lord. *Vid.* Co. Litt. 88. a. [8]

Husband and wife purchase lands to them and the heirs of their bodies, and die leaving issue under fourteen years of age. In this case, if the maternal grandmother assume the guardianship before the paternal grandfather doth, she shall retain it. Finch Law. 30. vid. also Co. Litt. 88. a.

Tenants in common of personal estates having equal right to the goods, he that first gets possession of them shall hold them against the other. Co. Litt. 200. a.

22. *Matter of profit or interest shall be taken largely: and it may be assigned, and it may not be countermanded: but matter of pleasure, trust or authority, shall be taken strictly, and may be countermanded.*

As licence to him in my park, or in my garden to walk, extendeth only to himself, and not to his servant, or any other in his company, for it is matter of pleasure only. Otherwise it is of a licence to hunt, kill, and carry away the deer, which is matter of profit.

A church way is matter of ease.

† A licence to come into my house to speak with me, or a letter of attorney may be countermanded. So of goods bailed over to be delivered to *J. S.* or to dispose of them in alms. Otherwise it is of a thing bailed in consideration or satisfaction of another thing; as if the bailor had been bound to pay such a sum; or if he says, that whereas *J. S.* has enfeoffed him of such land, in consideration thereof he gives him the money. *Dyer 49.*

A man deviseth that his two executors shall take the profits of his lands until his heir be of age, to pay debts, &c. one of them dies, and then the other, who leaves executors. The executors of him last dying shall take the profits, because it is a matter of interest and survives, had it been only an authority it would have been otherwise. Dyer 210.

If a man hath power of attorney to deliver seisin, and he deliver it otherwise than in his power, it is void; because authorities must be strictly pursued. Co. Lit. 258. a.

OF POLITICAL.

23. *Nothing shall be void which by possibility may be good.*

If land be given to a man, and to a woman married to another man, and the heirs of their two bodies, this is a present estate-tail, because of the possibility. *Vid. Co. Lit. 20. b.*

† Where I suffer an injury joined with a loss, the law shall give me a remedy and recompence according to my certain and uncertain loss; yea, and sometimes where the thing is not in being but utterly extinguished. *Hob. 43.*

† And touching the uncertainty, if a man grant an advowson with warranty, and the tenant in a writ of right of advowson vouch, he shall have, if he lose, recompence in value of land, or other certain profit, and yet the advowson of itself is utterly of an uncertain value. So of a liberty, *bona et catalla felonum. Hob. 43. Co. Litt. 197. b.*

Leases for years ought to have a time certain mentioned when they are to begin, and when they are to end. Yet if a lease be made for so many years as J. N. shall name, it is not void for uncertainty, for when he has named the years, the lease will be good, & id certum est quod certum reddi potest. Co. Lit. 45. b.

24. *Ex nudo pacto non oritur actio.* Plowd. [9]
Com. 305.

A void contract creates no cause of action.

No man is bound to his promise, nor any use can be raised, without good consideration.

A consideration must be some cause or occasion which must amount to a recompence in deed, or in law, as money, or natural affection;

tion; not long acquaintance, nor great familiarity.

Thus if I bargain and sell all my trees in such a close or the like, and no consideration is expressed, nothing passes; because there is not quid pro quo, which there must be to constitute a good contract. Dyer 90. b.

Where the eldest sister had the entailed lands and the youngest the fee-simple lands; the youngest aliened part in fee and died, so that a full recompence for the land entailed did not descend to her issue; it was held that her issue might waive taking the profits of the fee-simple lands, and enter into the lands entailed; for the issue in tail shall not be barred without full recompence. Co. Lit. 173. a.

So in Shelly's case, though the recoverer died before execution, yet the judgment being to recover in value, the issue was barred. 1 Co. 106. Vid. also Vinyor's Case 8 Co. 80. 1. Pow. Cont. 330. 1. Trea. Eq. 321. Fonblan. Ed.

25. *The law favoureth a thing that is of necessity.*

As to pay several expences shall not be said to administer, to distrain in the night damage feasant, to kill another to save his own life.

A servant to beat another to save his master, if he cannot otherwise chuse.

To drive another man's cattle amongst mine own, until I come to a place to shift them, is no trespass.

† So if divers be in danger of drowning by the casting away of some boat or barge, and one of them get to some plank, or on the boat's side to keep himself above water, and another to save his life thrust him from it, whereby he is drowned;

drowned; this is neither *se defendendo* nor by misadventure, but justifiable. *Bac.*

Though regularly the lord can distrain only in the day time, yet cattle damage feasant may be distrained in the night, otherwise they might be gone before they could be taken. Co. Lit. 142. a.

So though an infant can in general do no legal act; yet he may present to a benefice, otherwise it would lapse. Ibid. 172.

So where it is not lawful for a man to enter upon land, a continual claim is sufficient to save his right. Ibid. 150. b.

Many more illustrations of this maxim may be found. Bac. El. p. 55. Vid. also 1 Blac. Com. 130.

26. *The law favoureth things for the good of the common wealth.*

As killing of foxes, and the pulling down of an house of necessity to stay a fire.

† In cases which are for the public good of the people, a man may justify doing a wrong. As in time of war a man may erect bulwarks on another man's lands. *Plowd. 322. Dyer 36. b.*

† A man may justify the raising of an house that is burning for the safeguard of the neighbouring houses. And if a sheriff pursue a felon to an house, and to apprehend the felon he breaks open the door of the house, he may justify it; because it is for the good of the public that felons should be taken. *Plowd. 322.*

† Valuable things for the benefit and maintenance of trade, which by consequence are for the good of the public, and are in any place by authority of law, shall not be distrained: As an horse in an inn, materials in a weaver's shop for making of cloth, sacks of corn in a mill,
8 market,

market, &c. and no man shall be distrained for the instruments of his trade or profession; as the axe of a carpenter, books of a scholar, &c. when other goods may be taken. *Co. Lit.* 47.

Parishes, without any custom or charter to authorize them, may make bye-laws for repairing the church, or the highways. 3 *Co.* 63. a.

27. *Communis error facit jus.* 4 *Inst.* 240.

Common error maketh a right.

As an acquittance made by the Mayor alone, where there be an hundred presidents, is good.

† This is established upon custom; for the law so favoureth the public good, that it will permit a common error to pass for right: As in cases of common recoveries, first had upon feigned and unlawful ground, which nevertheless having been used a long time, so as they have been taken and allowed of divers persons well learned, as for law, are esteemed good. And that a common recovery bars an estate tail, is not to be disputed; because a great part of the inheritances of the kingdom depends upon it. *Plowd.* 33. b. *Vid. also Hob.* 147. *Wood Inst.* 41. 1 *Peere Wil. Corporation of Bewdley.*

28. *The law favoureth things that are in the custody of the law.*

Goods taken by distress, shall not be taken in execution for the debt of the owner thereof.

† Tenant for the remainder to the right heir of J. S. tenant for life is disseised, and the descent cast, and afterwards J. S. dies, and after that the lessee for life dies, the entry of the right heir of J. S. is lawful; for this is commonly in the custody of the law, which preserves

preserves it lawfully and without any violence or destruction. 1 Co. 134. b.

† Where beasts are impounded in the same land for damage-feasant, the lord of the land cannot distrain them for rent, because they are in the custody of the law. Br. tit. *Distress*. [10]

29. *The husband and wife are one person.*

They cannot sue one another, nor make any grant one to another. And if a woman marry with her obligor, the debt is extinct, and she shall never have any action if another were bound with him; for by the marriage the action is suspended; and an action personal suspended against one, is a discharge to all.

If a joint estate in land be made to a man and his wife and a third person, the man and his wife shall have but a moiety, and the third person the other moiety. So if it be given to a man and his wife and two others, they shall have but a third; for they are but one person in law. Lit. § 665. Co. Lit. 187. a.

An action of debt lies against the husband for goods delivered or sold to the wife, for the law presumes they must come to the possession and use of the husband; and the husband and wife are but one person. Prac. Reg. 102. See the extent of this max. 1 Blac. Com. 442. Vid. also Finch. 41. Co. Lit. 24. 235.

30. *An obligation with a condition to enfeoff a woman before such a day, and before the day the obligor taketh her to wife, the obligation is forfeited; (1) because he cannot enfeoff her; but he may make a lease for years with a remainder to his wife.*

(1) In law; but a court of equity will enforce it as a marriage agreement. Vid. 2 Fer. 290. Prec. Chan. 237.

When a joint purchase is during the marriage, every one shall have the whole.

When a joint purchase during the marriage is made, and the husband sell, the wife shall have a *cui in vita* for the whole against both; and [11] on a feoffment made to one man and his wife, and to a third person, the third person shall have one moiety.

† A feoffment is made to a man and woman and their heirs, with warranty, they intermarry, and after are impleaded and recover in value, moieties shall not be between them; for though they were sole when the warranty was made, yet at the time when they recovered and had execution, they were husband and wife, at which time they cannot take by moieties. *Plowd.* 483.

† If a woman sole be indebted, and then take husband, it is now become the debt of the husband and wife, and both are to be sued for it; but after the death of the wife, the husband is not liable; unless there be a judgment obtained against them both during the marriage. *Pract. Reg.* 105.

† A man must answer for the trespasses of his wife; and if a feme covert slander any person, the husband and wife must be sued for it. But for scandalous words against a man and his wife, the husband may prosecute one action alone for his slander, and afterwards join in an action with his wife for her's. *Style's Rep.* 113.

† And if an obligation made to a feme, becomes payable during coverture, and afterwards the wife dies, the husband shall have an action of debt upon it; because it was a duty to the feme, and a thing in action before marriage; but it is otherwise where rent is in arrear. *F. N. B.* 121.

† Where a wife hath a term of years the husband

husband cannot devise it to another by will, or grant a rent-charge out of it; for she had an estate in it before, and so hath at the time of his death; and she surviving, is remitted to the term, whereupon she shall avoid the rent-charge. *Plowd.* 418.

31. *All that a woman hath, appertaineth to her husband.*

Personal things, and things absolutely real, as lands, rents, and so forth, or chattels real, and things in action, are only in her right; notwithstanding real things, and things in action, he may dispose at his pleasure, but not will nor charge them; and he shall have her real chattels, if he survive. Of things in action, the woman may dispose by her last will, and she may make her husband her executor, and he shall recover them to the use of the last will of his wife. *Vid. Co. Lit.* 351.

If a lessee for years grant his term to a man, or woman, and to another, they are joint-tenants: but if goods be given to her and to another, her husband and the other are tenants in common.

The husband may release an obligation, or trespass for goods taken when his wife was sole, and it shall be good against the woman if he die; but if he die without making any such release, the woman shall have the action, and not the executor of her husband.

The woman surviving shall have all things in [12] action; or her executors, if she die.

The husband shall be charged with the debts of his wife but during her life.

A feme covert cannot make an executor without the consent of her husband; and the administration of her goods of right belong to him. 4 Co. 51. b.

28 MORAL RULES.

Vid. the mod. law and distinctions relative to the property of baron and feme, Co. Lit. 13 ed. 3. a. n. 1. 32. a. n. 10. 325. b. n. 1. 351. a. n. 1.

32. *The will of the wife is subject to the will of her husband.*

Note ; A feoffment made to the wife, she shall have nothing if her husband do not thereto agree. Vid. Co. Lit. 352. 356.

If a feme sole devise lands to a man and afterwards takes him to husband and dies, the heirs of the wife shall have the land ; because after marriage the will of the wife is in judgment of law restrained, and subject to that of her husband. 4 Co. 61. a.

Though a feme covert may purchase without the consent of her husband, yet he may disagree thereto ; and if he agree to it and die, she may nevertheless waive the purchase, and so may her heirs if she have not agreed thereto ; for she had no free will. Co. Lit. 3. a.

MORAL RULES.

33. *The law favoureth works of charity, right and truth, and abhorreth fraud, covin and incertainties which obscure the truth ; contrarieties, delays, unnecessary circumstances, and such like.—Dolus & fraus una in parte sanari debent. (Deceit and fraud should be remedied on all occasions.)*

It favoureth works of charity ; therefore charitable uses are not taken away by stat. 23 H. 8. c. 10. though the words of the statute are general ; but only superstitious uses. 1 Co. 24. a.

It favoureth right ; so that no act (even though under pretext of religion) shall work a wrong

to a stranger who has right; and bar him of his entry; therefore if disseisor have issue and enter into religion, the disseisee shall not be barred of his entry. Co. Lit. 248. b.

If tenant for life plead covenously to the disinherittance of him in reversion, it is forfeiture; for the law abhorreth fraud. Co. Lit. 252. a.

If a man make a lease for so many years as A. shall live, it is void for uncertainty. Co. Lit. 45. a.

34. No man can take benefit of his own wrong.

If a man be bound to appear at a day, and before the day the obligor cast him in prison, the bond is void. Vid. Co. Lit. 208. a.

A grant of all his woods in black acre, which may be reasonably spared, is a void grant, if it be not reserved to a third person, to appoint what may be spared.

A feoffment made in fee of two acres to two men, *habend'* one acre to one, and the other acre to the other, this *habend'* is void. [13]

† One in execution escapeth, and the gaoler takes him again, the party if he will may have him to remain in prison in execution for him still, for the escape is his own wrong; and if one in prison upon execution escape, and he be taken, he shall not bring an *audita querela* to discharge himself of his imprisonment; for he shall not take advantage of his own wrong.

3 Co.

† A. deviseth lands to B. until eight hundred pounds be levied for his daughter's portion; his son and heir entreth and conceals the will, whereupon he receives the profits before the will is discovered; but afterwards the devisee enters and receives the profits, until they amount to six hundred pounds; the heir is to supply the

rent, for he shall not take advantage of his own wrong. 4 Co. 63.

† If lessor and lessee for years join in the cutting down of timber-trees, the lessor shall not punish the lessee in a writ of waste, and take advantage of his own wrong. *Perk.* 41.

35. *Lex neminem cogit ad impossibilia, &c.*
5 Co. 21.

The law compels no one to impossibilities, &c.

The law compelleth no man to shew that which by intendment he doth not know: as if a servant be bound to serve his master in all his commandments lawful, it is a good plea, to say, he served him lawfully.

A covenant to make a new lease upon the surrender of the old lease, and after the covenantor doth make a lease by fine, for more years to estrange, the covenant is broken, although the lessee did not surrender, the which by the words ought to be the first act, for that the other had disabled to take, or to make.

† If a man be bound in an obligation, &c. with condition, that if the obligor doth go from the church of St. Paul's, London, to the church of St. Peter's at Rome, within three hours, this condition is void and impossible, but the obligation may be good. *Co. Litt.* 206.

† If a lease be made for forty years upon condition that the lessee dwell upon the lands the whole term, and he dieth at the end of ten years, the executors shall enjoy the land, because the condition is become impossible. *Dod.* 37 *Eliz.*

† If a deed remain in one court, it may be pleaded in another court, without shewing forth; for the law doth not compel any one to impossibilities. And if a lessee covenant to leave woods, &c. in good
good

good condition, and during the term they are blown down by winds, the lessee shall not be sued, because it is impossible he should perform his covenant. 1 Co. 98.

LAW CONSTRUCTIONS.

The law expoundeth things with equity and moderation, to moderate the strictness. It is no trespass to beat his apprentice with a reasonable correction, or to go with a woman to a justice of peace, to have the peace of her husband against the will of her husband, which equity doth restrain the generality, if there be any mischief or inconvenience in it: as if a man make a feoffment of his lands in and with common in all his land in C. the common shall be intended within his lands in C. and not in his other lands he shall have elsewhere. [14]

36. *Every act shall be taken more strictly against him that made it.*

As if two tenants in common grant a rent of ten shillings, this is several, and the grantees shall have twenty shillings; but if they make a lease, and reserve ten shillings, they shall have only ten shillings between them. *Vid. Co. Lit.* 17.

So an obligation to pay ten shillings at the feast of our Lord God, it is no plea to say that he did pay it; but he must shew at what time, or else it will be taken he paid it after the feast. *Vid. Co. Litt.* 303. b.

† If tenant in fee make a lease for life, without expressing for whose life, it shall be intended for the life of the lessee, and shall be taken strongly against the lessor; but contrary in tail, it shall be taken for the life of the lessor, because

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otherwise it would work a wrong to the reversioner. *Co. Lit.* 42.

† If a man give lands to another *et hæredibus* (and heirs), it shall be a fee-simple without the word *suis* (his), and though he doth not give him a fee-simple expressly. If I give lands to *A. B.* and his heirs males, this will be a good fee-simple, and the word males is void. *Plowd.* 18. *Bac. Max.* 12. And if a man give lands to one *et filio suo primogenito*, (and to his first begotten son) and he hath no son at the time of the gift, but afterwards he hath a son, that son shall have the land by way of remainder; for the law construes the limitation strong against the maker. *Plowd.* 29.

† But though grants are taken strongly against the makers, yet no wrong must thereby be done, as I have already observed. And a man may not be obliged by his own act to do some things which are against law: as a dyer was bound not to use his trade for two years, and the obligation was held against the common law. And if a husbandman be bound not to till or sow his ground, the obligation is contrary to the common law, and void. *11 Co.* 53. *Vid. also Bac. Max.* 87.

37. *He that cannot have the effect of the thing shall have the thing itself.—Ut res magis valeat quàm pereat* (That a thing may rather be good than void).

As if a termor grant his term *habendum immediate post mortem suam* (immediately after his death) the grantee shall have it presently.

† The king shall not be received after default of his tenant for life, because the demandant will not have the effect of the receipt, *viz.* to declare

clare against him afresh, for no one shall declare against the king, for they must sue him by petition. 25 E. 3. 48.

† Tenant in tail makes a lease for life, this shall be construed for the life of the lessee. Lit. 140. b.

† An annuity granted *pro consilio impendendo* (for giving his advice) or a feoffment for instructing a son, or for paying a sum of money, is a condition without conditional words; because otherwise, the party would be without remedy. Mar. 141, 142.

38. *When many join in one act, the law saith it is the act of him that could best do it, and that thing should be done by those of best skill.*

As the disseisee, and the heir of the disseisor, who is in by descent, join in a feoffment, this shall be the feoffment of the heir only, and the confirmation of the disseisee. [15]

And the merchant shall weigh the wares, and not the collectors.

† An use limited to commence when an eldest son (in ward to the king) is married by J. S. he is married by the king and J. S. yet no use arises, for he is married solely by the king. A patron who suffers an usurpation for six months, grants an annuity to J. S. till he is promoted to the benefice by him, and afterwards he and the usurper join in granting the presentment, yet the annuity does not cease. Dyer 191.

† If a condition be, that the obligee shall carry to the shop of the obligor (being a taylor) three yards of cloth, which shall be there cut out, and then that the obligor should make the

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obligee a coat of it, the obligor *viz.* the taylor is bound to cut it out. *Finch* 16.

† Issues joined shall be tried by those who have most skill, *viz.* issues upon points of law, that is, demurrers shall be argued before, and adjudged by the judges learned in the law, &c. 4 *Eliz.* 230. b.

† Disseisin of an office in the Common Pleas, or rasure of a record there, shall be tried by the filacers and attornies attending in that court. 11 *E.* 4. 3. b. *Vid. also* 2 *Mod.* 304.

39. When two titles concur the elder shall be preferred. 2 *Inst.* 714. †

† A disseisor lets the land of the disseisee for years or at will, now if he enters, the law will say, that he is in on his ancient and better title. *Littlel. Co. Lit.* 352.

Where one mortgages land, and afterwards grants a lease of them at a rack rent, and gives the lessee possession, yet the mortgagor if he did not assent to the demise may recover the premisses by ejectment against the lessee. *Doug.* 23.

40. By an acquittance for the last payment, all other arrearages are discharged.

If tenant be in arrear twenty years, and his landlord give him a receipt for the last rent, all arrearages shall be held to be paid; and no proof shall be admitted to the contrary. *Co. Lit.* 373. a.

Though but part of a sum be paid, yet if acquittance be given for the whole, it is a discharge. *Ibid.*

41. One thing shall enure for another.

If the lessor enfeoff the lessee for life, it shall be taken for a confirmation. *Vid. Co. Lit.* 30. b.

† A man

† A man grants the third presentment of an advowson and dies, the heir shall present twice, and the wife shall have the third for her dower; and then at the next avoidance after this the grantee shall present, so that he shall have only the fourth. *Ibid.* 379. a.

† The king pardons the not building a bridge, this is only good for the fine for not building it: but notwithstanding the party shall build the bridge, for the king's subjects are interested in it. 2 *Haw. P. C.*

A man having a rent charge issuing out of the wife's lands, releases it to the husband and his heirs; yet the husband shall not have it, but it shall enure by way of extinguishment. Plow. Com. 372.

42. *In one thing, all things following shall be concluded, in granting, demanding, or prohibiting.*

If one accept a close of wood, the law will give him a way to it.

† As confederacy and combination to execute any unlawful act is punishable by law, before the unlawful act is executed, the law punishes the combination and confederacy to prevent the unlawful act; and therefore the commission of oyer and terminer giveth power to the commissioners to inquire of all combinations, confederacies, &c. 9 *Co.* 57.

† In action of waste, a writ of estrepment will lie; and when it comes to the sheriff, by virtue of it he may resist those which will make waste; or if he cannot otherwise prevent it, he may imprison them; and if it be necessary, he may take the *posse comitatus* for his aid; though the words of the writ are only, that he shall personally

sonally go to the messuage and take order that no waste be done, hanging the plea; because when any thing is commanded, that is also commanded that we may come at it. 5 Co. 115.

† If a man grant to me all his trees growing in his woods, it is implied, that I may come upon the ground and cut them down, and carry them through all his land (though his grass receive injury by the carriage) and he shall not have a writ of trespass against me; for trees are such things, that if they are not carried by carts, I cannot have them to make my best profit of them: and a man shall always justify the necessary circumstance where he hath title to the principal thing. *Plowd. Com. 15.*

† In case a lessor upon his lease excepts the trees, and afterwards hath an intention to sell them, the law, as incident to the exception, gives to him and those who are willing to buy them, power to enter and shew and view the trees; because without entry, they cannot be viewed; and without view, they cannot be bought. 11 Co. 52.

† If a man hath mines hidden within his lands, and make a lease of the said lands and all the mines in the same, there the lessee may dig for them; for *quando aliquis quid concedit, &c.* (for when any one grants any thing, &c.) But if a man lease his land to another, in which there is a hidden mine, but mines are not mentioned in the grant, he cannot dig for it, if he do it is waste; though if he makes a lease of all his lands and all the mines, it is otherwise for the reasons aforesaid. 5 Co. 12.

† A tenant at will soweth corn on the ground, and the lessor ousts him, he shall have free entry, egress and regress, to cut and carry away the same;

same; for when the law giveth any thing to any one, it giveth implicitly whatsoever is necessary for the taking and enjoying of the same: and if the lessee be disturbed in carrying his crop, he may bring an action upon the case, and recover damages. 1 *Inst.* 56.

43. *A man cannot qualify his own act.*

As to release an obligation until such a time.

† Upon the grant of the reversion of three acres, and the tenant attorns for one, this is good for all three. *Fitzh. Abr. tit. Variance* 43.

† A person makes a lease for forty years, the patron and ordinary confirms the said demise for twenty years, yet this confirmation extends to the whole term. 5 *Co.* 81.

If an obligee release his debt till Michaelmas, it is good for ever. *Co. Lit.* 274. b.

44. *The construction of the law may be altered [16]
by the special agreement of the parties.*

If a house be blown down with the wind, the lessee is excused in waste; but if he have covenanted to repair it, there an action of covenant doth lie by the agreement of the parties. *Vid. Co. Lit.* 53.

If two jointenants exchange with one another, they would by construction of law hold the exchanged lands jointly; but if the exchange expresses that they shall hold in common, it shall be so. *Co. Lit.* 51. a.

45. *The law regardeth the intent of the parties and will imply their words thereunto; and that which is taken by common intendment shall be taken to be the intent of the parties: and common intendment is not such an intendment*

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ment as doth stand indifferent, but such an intent as has the most vehement presumption. All uncertainty may be known by circumstances, every deed being done to some purpose, reason would that it should be construed to some purpose; and variance shall be taken most beneficial for him to whom it is made, and at election.

Though a common be granted to a man for all his beasts; yet he shall not have common for beasts not commonable. Co. Lit. 122. a.

Lessee for twenty years taketh lease for ten years to commence immediately, upon condition to be void if such a thing be not done; though it be void by non-performance of the condition, yet the surrender continues good. Plow. 107.

Tenant in tail makes a lease for life generally, it shall be intended for the life of lessee. Co. Lit. 33. 1. Vid. also Finch 71.

46. An intendment of the parties shall be ordered according to law.

If a man make a lease to a man and to his heirs for ten years, intending his heirs shall have it if he die, notwithstanding the intent, the executors shall have it.

† Two jointenants of an acre of land, change it with a stranger, they shall be jointenants of the land exchanged; but if the exchange be to have the acre in common between them, this is good. Co. Lit. 188. 190.

If patentee of an office of trust assign it over it will not pass; because it is against law. 9 Co. 48. a.

A warrant of attorney to deliver seisin cannot be granted over; it being matter of authority. Vid. Max. 22.

47. *Qui per alium facit, per seipsum facere videtur.* 1 Inst. 258. [17]

He who acts by another, is held to act by himself.

A promise made to the wife in consideration of a thing to be performed by her husband, if he agree, and perform the consideration, in an action of the case, he shall declare the assumption was made to him.

And if my servant sell my goods to another in debt, I shall suppose he bought them of me.

† A servant by command of his master may make claim of land for his master; and if the servant doth all that he was commanded, and which his master ought to do, there it is as sufficient as if his master had done it himself. 1 Inst. 258.

† If I declare by my last will, that *A. B.* shall alien my land, and he doth so, it is my alienation by him; and if I give authority to my bailiff to sell my sheep, or other cattle, and he doth so, it is my sale by him. *Plowd.* 475.

A letter of attorney to deliver possession to a lessee; if he deliver to the lessee's attorney it is good. Co. Lit. 49.

C U S T O M S.

48. *Consuetudo est altera lex.* 4 Co. 21.

Custom is a second law.

Customs are of two sorts: general customs in use throughout the whole realm, called
Maxims;

Maxims; and particular customs used in some certain county, city, town, or lordship, whereof some have been specified before, and some follow here, and where occasion is offered.

The king's excellency is so high in the law, that no freehold may be given to him, nor derived from him but by matter of record.

[18] Every maxim is a sufficient authority to itself; and which is a maxim, and which is not, shall always be determined by the judges, because they are known to none but to the learned.

A maxim shall be taken strict.

A particular custom, except the same be a record in some court, shall be pleaded and tried by twelve men.

† And what a copyholder of a manor ought to do, or ought not to do, the custom of the manor must direct. If there be no custom to the contrary, waste, either permissive or voluntary, of a copyholder, is a forfeiture of his copyhold. 1 *Inst.* 63.

† Refusing to do suit of court, to pay rent to the lord, being demanded on the land, not coming to be admitted tenant on a third proclamation, making a lease for longer time than a year, &c. are forfeitures of copyhold estates, by the general custom of manors. *Ibid.*

† A lord of a manor may grant a copyhold out of his manor; and a surrender may be made to the lord or his steward, either in or out of the manor, without a particular custom. 1 *Inst.* 59.

† If a copyholder for life surrender to another in fee, it is no forfeiture of his estate; for it passeth to the lord by surrender and not by livery. And copyhold estates shall not have the collateral

collateral qualities that estates of the common law have without special custom; for the custom of the manor is to be observed. 1 Co. 22.

+ Acres of land are to be accounted according to the measure of the country: and if a man bargain and sell so many acres of wood, they shall be measured according to the usage of that country. *Brac.*

Customs shall not be construed so as to enable a person to do a wrongful act. Cro. Jac. 80.

For the requisites to constitute a good custom, vid. Co. Lit. 110. 113. b. 1 Bl. Com. 77. Dav. 31. b.

C H A P. II.

S T A T U T E S.

THE last ground of the laws of *England* standeth in divers statutes made by our sovereign lord the king and his progenitors, and by the lords spiritual and temporal, and the commons, in divers parliaments, in such cases where the former laws seemed not sufficient to punish evil men, and to reward the good.

Of general statutes, the judges will take notice if they be not pleaded; but not of special or particular.

All acts of parliament, as well private as general, shall be taken by reasonable construction, to be collected out of the words of the act only, according

cording to the true intention and meaning of the maker. (1)

Vid. 1 Blac. Com. 85. and 1 Burn. J. xxiv. *where the principal rules for the construction of statutes are methodically stated. Also Co. Litt. 13 ed. 381. a.*

[19] *Four lessons to be observed where contrary laws come in question.*

1. The inferior law must give place to the superior.
2. The law general must yield to the law special.
3. Man's laws to God's laws.
4. An old law to a new law.

And oftentimes all these laws must be joined together to help a man to his right: as if a man disseised, and the disseisor made a feoffment to defraud the plaintiff, in this case it appears, that the said unlawful entry is prohibited by the law of reason.

But the plaintiff shall recover the double damage, and that is by the statute of 8 H. 6. And that the damage shall be cessed by twelve men; that is, by the custom of the realm: and so, in some cases, these three laws do maintain the plaintiff's right.

And these laws concern either men's possessions or the punishment of offences.

And so much shall be sufficient to be said touching common law, customs, and statutes.

(1) This holds only with regard to *remedial* statutes; for *penal* statutes are construed strictly and according to the letter; thus stat. 1 Ed. 6. c. 12. enacting that persons convicted of stealing *horses* shall be guilty of felony without clergy, was held not to extend to the stealing of *one horse*, though evidently within the meaning of the legislature. *Bac. El. c. 12.*

Concerning POSSESSIONS.

[20]

The difference between possession and seisin is; Lease for years is possessed, and yet the lessor is still seised; and therefore the *terms of the law* are, that of chattels a man is possessed; whereas in feoffments, gifts in tail, and leases for life, he is called seised.

C H A P. III.

Of Possession of Franktenement.

TENANT in fee-simple is he which hath lands or tenements to hold to him and his heirs for ever. It is the best inheritance a man may have; he may sell, or grant, or make his will of those lands.

And if a man die, they do descend to his heir of the whole blood.

See more fully as to how lands in fee-simple descend, infra, chap. 4. also Co. Litt. 1. 8. b. 2 Blac. Com. 104.

C H A P. IV.

[21]

F E E - T A I L.

FEE-TAIL is of what body he shall come that shall inherit.

Tenant in tail is said to be in two manners:

Tenant in tail general, and tenant in tail special.

General tail is, where lands or tenements be given to a man and his wife, and to the heirs of their

their two bodies, or to his heirs males, or to his heirs females.

Tenant in tail is not punishable for waste.

Tenant in tail cannot will his lands, nor bargain, sell, or grant, but for term of his life, without a fine or recovery. (1)

If a man will purchase lands in fee, it behoveth him to have these words *heirs* in his purchase.

If a man would grant lands in tail, it behoveth him to appoint what body they shall come of.

Yet a devise of lands to a man and his heirs males is a good intail, and of lands to a man for ever, a good fee-simple. (2)

For the principal incidents to this kind of tenancy, vid. 2 Bl. Com. 115. also Co. Litt. 18. b. &c.

[22]

How lands shall descend.

Inheritance is an estate which doth descend: it may not lineally ascend from the son which purchaseth in fee, and dieth, to his father; but descendeth to his uncle or brother, and to his heirs, which is the next of the whole blood, for the half blood shall not inherit, but the most worthy of blood; as of the blood of the father before the mother, of the elder brother before the other, and born within espousal.

A descent shall be intended to the heir of him which was last actually seised; that the sister of the whole blood, where the elder brother did enter after the death of his father, and not his bro-

(1) But he may appoint to a *charitable use* without fine or recovery. 2 *Ver.* 453.

(2) Any other expressions in a will are sufficient, so that they clearly shew the testator's intention to create any particular estate. *Co. Litt.* 9. b. 27. a.

ther of the half blood, nor any other collateral cousin shall inherit; yet notwithstanding such a one is heir to a common ancestor: in which rule every word is to be observed, and so in every maxim, if the land, rent, advowson, or such like, do descend to the elder son, and he die before any entry or receipt of the rent, or presentment to the church, the younger son shall have and inherit: and the reason is, because that in all inheritances in possession, he which claimeth title thereunto as heir ought to make himself heir to him that was last actually seised. [23]

Here the possession of the lessee for years or of the guardian, shall invest the actual possession and franktenement in the elder brother.

But he dying seised of a reversion, or a remainder, or an estate for life or in tail, there he which claimeth the reversion or remainder as heir, ought to make himself heir to him that had the gift, or made the purchase.

Feodo excludeth an estate-tail, where the second son shall inherit before the daughter.

And if the lands be once settled in the blood of the father, the heir of the mother shall never have them; because they are not of the blood of him that was last seised.

And to the heir of the blood of the first purchaser :

As if the father purchase land, and it descendeth to the son, who entreth and dieth without heirs of the father's part, then the land shall descend to the heirs of the mother, or father of the father, and not to the heirs of the mother of the son, although they are more near of blood to him that was last seised, yet they are not of the blood of the first purchaser.

If

- [24] If the heirs be females in equal distance, as daughters, sisters, aunts, &c. they shall inherit together, and are but one heir, and are called parceners.

See the principal rules of descent, with the feudal reasons on which they are founded, 1 Bl. Com. 193. 2d Ditto 208. Vid. also Co. Litt. 237. a.

Land in Gavilkind,

Doth descend to all the sons, and if no sons, to all the daughters; and may be given by will by the custom.

C H A P. V.

P A R C E N E R S.

PARCENERS are of two sorts: women and their heirs by the common law, men by the custom.

They may have a writ of partition, and the sheriff may go to the lands, and by the oaths of twelve men make partition between them, and the eldest shall have the capital messuage by the common law, and the youngest by the custom. Where the parties will not shew to the jury the certainty, there they shall be discharged in conscience, if they make partition of so much as is presumed and known by presumptions and likelihoods.

- [25] Parceners may by agreement make partition by deed or by word, (1) and the eldest first

(1) It seems doubtful whether a parol agreement would be valid since the stat. 29 Ch. II. c. 3. It was allowed, however, under the circumstances of a case in 1 Atk. 542.

Vid. 8 and 9 Wil. 3. c. 3. and 7 An. c. 18. concerning partition of lands in coparcenary, jointenancy, and tenancy in common.

chuse, unless their agreement be to the contrary.

Every part at the time of partition must be of an even yearly value, without incumbrance.

Rent may be reserved for equality or partition (and may be distrained for) without a deed.

Parceners by divers descents, before partition being disseised, shall have one assise.

A parcener before partition may charge or demise her part.

The entry or act of one copartner or jointenant shall be the act of both, when it is for their good.

If a parcener after partition be entred, she may enter upon her sister's part, and hold it with her in parcenary, and have a new partition, if she hold none of her part before she was outed, viz. in exchange.

For the properties of an estate in coparcenary, how it differs from a jointenancy, &c. vid. 2 Bl. Com. 188. also Co. Litt. 163. a.

CHAP. VI.

JOINTENANTS.

Jointenants be such as have joint estates in goods or lands, where he that surviveth shall have all without incumbrance, if the tenements abide in the same plight as they were granted. [26]

Jointenants

48 TENANTS in COMMON.

Jointenants may have several estates. (1)

A jointenant cannot grant a rent-charge but for term of his own life.

A jointenant may make a lease for life or for years of his part, or release, (2) and the lessee for years may enter, although the lessor die before the lease begin, and his heir shall have the rent, but the survivor the reversion.

A jointenant may have a writ of partition by the statute of 31 H. 8. c. 32. A partition made by jointenants, or tenants in common of estates of inheritance, must be by indenture, by word 'tis void.

For the properties of a joint estate, how it may be created, and how destroyed, vid. 2 Bl. Com. 180. also Co. Litt. 180. b. 188. a.

C H A P. VII.

TENANTS in COMMON.

TENANTS in common are those that hold lands and tenements by several titles.

They may join in action personal, but they must have several actions real. (3)

(1) As it is expressly held by all our law authorities, that jointenants cannot have different interests in their tenancy, but must have a *unity of interest, title, time, and possession*, we cannot reconcile this expression with the known learning of the author, but by supposing an inaccuracy in the language.

(2) But by doing this he destroys the jointenancy, and converts the estate into a tenancy in common. *Co. Litt. 192. a. 199. a.*

(3) Vid. exception to this rule in respect of an advowson, *Co. Litt. 198. a.*

They

TENANT in DOWER. 49

They may have a writ of partition by the statute of 31 H. 8. c. 32.

If one parcener, jointenant, or tenant in common take, all the others have no remedy but by *ejectione firmæ*, or such like, or waste. (1) [27]

See the incidents, &c. of a tenancy in common, 2 Bl. Com. 192. Co. Litt. 188. b.

Gavilkind Lands.

Tenant by the curtesy of *Kent*, whether he have issue or no, until he marry, and so forth, he may not commit waste.

C H A P. VIII.

TENANT in DOWER.

A Woman shall be endowed of all sorts of inheritance of her husband, (2) where the issue that she had by him may inherit as heir to his father, by metes and bounds of a third part.

She shall have house-room, and meat, and drink in common for forty days: but she may not kill a bullock within those forty days after the death of her husband, in which time her dower ought to be assigned her.

The assignment by him that had the frank-

(1) So it was at the common law, but by stat. *West.* 2. c. 22. and 4 *Anne* c. 16. they have reciprocally actions of account, &c.

(2) Except of copyhold lands (unless by special custom) common without stint, trust estates, and an equity of redemption. Co. Litt. 31. b. 3 P. Will. 229. 1 Brow. 3 6.

50 TENANT in DOWER.

tenement is good; but by him that is guardian in socage, or tenant by *elegit*, (*verte elegit*) or statute, or lessee for years, is not.

[28] She is to demand her dower on the land.

She shall recover damages when her husband died seized from the death of her husband, if the heir be not ready at the first day to assign her dower.

She shall have all her chattels real again, except her husband sell them: he may not charge them or give them by his will. And likewise her bonds, if the money were due in the life of her husband, and all convenient apparel; but if she have more than is fit for her degree, it will be affets.

A woman shall be barred of her dower so long as she detaineth the body of the heir being in ward, or the writing of the son's land. (1)

A woman shall not be endowed of any lands that her husband jointly holdeth with another at the time of his death. ‡

See the various kinds of dower, with the law relating thereto. Co. Litt. 31. a. and notes to 13th ed. ibid. also 2 Bl. Com. 135.

DOWER of GAVILKIND LANDS.

If the woman shall be endowed of one half so long as she is unmarried and chaste, and it may be held with the heir in common.

(1) She shall also lose her dower if she elope from her husband and live with an adulterer. 13 Ed. 3. c. 34. or if she alien her assigned lands, 6 Ed. 1. c. 2. or if her husband commit treason, 5 & 6 Ed. 6. c. 11.

‡ Something similar to an *estate in dower* of the wife, is the husband's *estate by the curtesy*, which our author takes no notice of. The law concerning this estate may be found Co. Litt. 29. a. &c.—2 Blac. Com. 126.

TENANT for TERM of LIFE. 51

It is of lands and tenements, and not of a fair or such like, where the heir loseth not his inheritance, there she loseth not her dower.

Vid. Robinson on Gavilkind Tenure, and Co. Litt. III. a.

JOINTURE.

[29]

If a woman have a jointure before marriage, she may claim no dower. (1) 27 H. 8. c. 10.

If it be made during marriage, she may enter into her jointure presently. (2)

If she enter or accept of it, she shall not be endowed.

If she shall be expelled of any part of her jointure, she shall be endowed of the residue of her husband's lands.

Of the nature, &c. of a jointure, vid. 2 Bl. Com. 137. Co. Litt. 36. b. Wood In. 23. Lil. Conv. 404.

CHAP. IX.

TENANT for TERM of LIFE.

TENANT for term of life, is he that hath lands or tenements for term of his life, or another man's life, and none of lesser estate may have a freehold.

If a tenant for life sow the lands, and die before the corn be reaped, his executor shall have it, but not the grass nor other fruit.

(1) Even though a minor at the time she agree to it. 5 Br. Par. c. 570. *Drury and Drury.*

(2) If it be made during coverture, she may waive it on her husband's death, and take her dower at common law. *Co. Litt. 36. b.*

52 TENANT for TERM of YEARS.

If a tenant for life be impanelled upon an inquest, and forfeit issues and die, they shall be levied upon him in the reversion; and so likewise if the husband, on the lands of the wife.

For the law of tenants for life, and the incidents to their estates, vid. 2 Bl. Com. 120. Co. Litt. 41. b. Lilly Conv. 297.

[30]

CHAP. X.

TENANT for TERM of YEARS.

TENANT for term of years is, where a man letteth lands or tenements to another for certain years.

He may enter when he will, the death of the lessor is no let, and may grant away his term before it begin: but before he enter he cannot surrender, nor have any action of trespass, nor take a release.

He is bound to repair the tenements.

The lessor may enter to see what reparations or waste there is; and he may distrain for his rent, or have an action of debt.

If tenant for life or years granteth a greater estate than he hath himself, he doth forfeit his term. (1)

See the law relating to tenants for years, 2 Bl. Com. 140. Co. Litt. 43. b. Lil. Conv. 314. Wood In. 126.

(1) This depends upon the species of conveyance by which it is granted; if it be by those which divest the remainder or reversion, as a feoffment, recovery, or fine, it is a forfeiture; if by bargain and sale, or lease and release, it is not. 2 Lev. 60. 3 Mod. 151.

C H A P. XI.

TENANT at WILL.

TENANT at will is he that holdeth lands or tenements at the will of another.

The lessor may reserve a yearly rent, and may distrain for it, or have an action of debt: the lessee is not bound to repair the tenements.

The will is determined by the death of the lessor, (1) or of a woman lessee by her marriage; or when the lessee will take upon him to do that which none but the lessor may do lawfully, it determineth the will and possession, and the lessor may have an action of trespass for it. [31]

The lessee shall have reasonable time to have away his goods and his corn; but he shall lose his fallow and his dung carried forth.

Vid. more concerning tenancy at will, 2 Bl. Com. 145. Co. Litt. 55. a. Lil. Conv. 309. Wood In. 131.

Other tenures besides those mentioned by our author are:

An estate after possibility of issue extinct, which is where an estate is granted to a man and his wife in special tail, and one of them die without issue, the survivor is then tenant in tail after, &c. For the properties of this estate, *vid. Co. Litt. 27. b.*

An estate by the curtesy of England; *noticed sup. p. 50. n. †.*

(1) Tenants at will are now considered as tenants from year to year; and six months notice to quit must be given after the death of the lessor. 1 T. R. 159.

An estate at sufferance; *which is that estate which a man has in the lands, &c. which he keeps possession of after the expiration of his term. See the incidents relating to this estate, Co. Litt. 57. b. 2 Bl. Com. 150.*

An estate by copy of court roll; *defined by Litt. § 73. to be a tenure to a man and his heirs in fee-simple or fee-tail, or for term of life, &c. at the will of the lord of a manor, according to the custom of the same manor. See fully concerning this estate, Co. Cop. pas. 2 Bl. Com. 174.*

Estates by statute staple and statute merchant. *Vid. 2 Bl. Com. 160.*

CHAP. XII.

REMAINDER.

A Remainder is the residue of an estate at the same time appointed over, and must be grounded upon some particular estate given before, granted for years, or life, and so forth.

And ought to begin in possession, when the particular estate endeth: there may be no mean time between either by grant or will. (1)

No remainder can be of a chattel personal: (2)

(1) By will a remainder in effect and substance may be created without a particular estate to support it; but in technical language this is called an *executory devise*. *Vid. 1 Sid. 153. Fearne Ex. Dev. pas.*

(2) Personal property cannot be rendered unalienable longer than for lives in being and twenty-one years after; it may, however, be limited in strict settlement to one for life, with remainder to sons and daughters in tail; but it will be the absolute property of the first tenant in tail. *Vid. 8 Rep. 95. Co. Litt. 13 Ed. 18. b. n. 7.*

a remainder cannot depend on a matter *ex post facto*, as upon estate tail, upon condition, that if the tenant in tail sell, then the land to remain to another, is a void remainder. (3) [32]

Concerning the nice learning of remainders, vid. Fearne, cont. Rem. passim. Co. Litt. 378. a. 401. b. Lil. Conv. 262. Wood. In. 147.

C H A P. XIII.

R E V E R S I O N.

A Reversion is the residue of an estate that is left after some particular estate granted out, in the grantor: as if a man grant lands for life, without further granting, the reversion of the fee-simple is in the lessor.

For the doctrine of reversions, vid. 2 Bl. Com. 175. Co. Litt. 22. b. Lil. Conv. 271.

C H A P. XIV.

W A S T E.

WASTE lieth against a tenant by the curtesy, for life, for years, or in dower, and they shall lose the place wasted, and treble damages. (1)

(3) Nor can it be limited upon an estate at will. 8 Rep. 75.

(1) It will lie also against a common occupant by stat. Gl. c. 5. Vid. 6 Co. 37. Cro. Car. 95.

56 DISCONTINUANCE.

Waste lieth not against a tenant by *el. gift*, statute merchant or staple, but account after the debt or damage levied.

Waste or account will lie against a tenant in mortgage, because he had fee conditional.

[33] Waste is not given to the heir for waste in the life of his father.

Waste is given against the assign of the tenant for life, or of another's life, but not against the assignee of a tenant in dower, or of the curtesy, it is to be brought against themselves.

It is waste to pull up the forms, benches, doors, windows, walls, filberd-trees, or willows planted. (2)

Vid. the law concerning waste, 2 Bl. Com. 281. Co. Litt. 53. Wood. ln. 293.

CHAP. XV.

DISCONTINUANCE.

Discontinuance is where a man that hath the present possession by making a larger estate than he may, devesteth the inheritance of the lands or tenements out of another and dieth, and the other hath right to have them; but he may not enter because of such alienation, but is put to his writ.

If a man seised in the right of his wife, or if a tenant in tail, made a feoffment, and died, the wife might not enter, nor the issue in tail,

(2) It has been held that a tenant may, during the continuance of his estate, but not afterwards, remove chimney pieces or wainscot put up by himself, 1 *Atk.* 477.

nor

nor he in reversion, but are put to their action.

Now the wife may enter by the statute 32 *H.* 8. [34] and a recovery suffered by the tenant by curtesy, or by the tenant after the possibility of issue extinct, or for term of life, is now made no discontinuance.

Such things that pass by way of a grant by deed without livery and seisin, cannot be discontinued as a reversion or rent-charge common, &c.

A release or confirmation without warranty maketh no discontinuance. (1)

Vid. an outline of the doctrine of discontinuance, Co. Litt. 13th ed. 325. a. n. 1. also Gil. Ten. 107.

CHAP. XVI.

DESCENTS.

DESCENTS which take away entries, is where a man disleiseth another and dieth, and his heir entreth, or maketh a feoffment to another in fee or in tail, and he dieth, and his heir entreth, these descents put a man from his entry.

A descent during minority, marriage, *non sanæ mentis*, imprisonment, or being out of the realm, do not take away an entry.

(1) Those species of deeds only which divest the right of possession, as feoffment, &c. can work a discontinuance. *Vid. sup. p. 52. n. 1.*

Descents of rents in gross, the lord notwithstanding may distrain.

[35]

A dying seised of a term for life, or of a remainder or reversion, doth not take away an entry: he must die seised in fee and franktenement.

A disseisin cannot be to one jointenant or parcener alone, if it be not to the other.

If a condition be broken after a descent, the donor, feoffor, or his heirs may enter.

A wrongful disseisin is no descent, unless the disseisor have quiet possession five years without entry or claim. 32 H. 8.

See more concerning the law of descents which take away entry, Gil. Ten. 21. Co. Litt. 13th ed. 11. a. and 238. a. n. 1.

C H A P. XVII.

CONTINUAL CLAIM.

Continual claim is a demand made by another of the property or possession of a thing which he hath not in possession, but is withholden from him wrongfully, defeateth a descent happening within a year and a day after it is made, and now by the statute within five years.

See Gil. Ten. 39, concerning the law of continual claim. also Co. Litt. 13th ed. 250. b. n. 1.

CHAP. XVIII.

REMITTER.

REMITTER is when by a new title the franktenement is cast upon a man, whose entry was taken away by a descent or discontinuance, he shall be in by the elder title: as if tenant in tail discontinue the tail, and if after disseiseth his continuance, and dieth thereof seised, and the land descend to his issue, in that case he is said to be in his remitter, viz. seised of his ancient estate tail.

[36]

When the entry of a man is lawful, and he taketh an estate to himself when he is of full age, if it be not by deed indented, or matter of record which shall estop him, it shall be to him a good remitter.

A remitter to the tenant shall be a remitter to him in the remainder and reversion.

The reader will find an outline of the doctrine of remitter, Co. Litt. 13th ed. 347. b. n. 1.

CHAP. XIX.

TENURES.

ALL lands are holden of the king immediately, or of some other person; and therefore when any that hath fee dieth without heir, the lands shall escheat to the lord.

D 6

And

And they are holden for the most part either by knights service or in socage. (1)

Knights service draweth to it ward, marriage and relief.

Concerning tenures in general, vid. Co. Litt. 95. a.

[37] OF WARD, MARRIAGES and RELIEF.

The heir male unmarried shall be in ward until twenty-one years of age.

If he be married in the life of his ancestors, yet the lord shall have the profit of the land till his full age.

None shall be in ward during the life of the father.

If the heir refuse a convenient marriage, he shall pay to the lord the value when he cometh to full age.

If the ward marry against the will of the guardian, he shall pay him the double value of his marriage: but if the heir be of the full age aforesaid, he shall pay a relief.

A relief for a whole knight's fee is five pounds; for half a knight's fee fifty shillings; for a quarter, twenty-five shillings; for more, more; for less, less, accordingly.

A relief is no service, but is incident to a service, the guardian must not commit waste, viz. chattels.

(1) By stat. 12 Car. 2. c. 24. knight's service, with its incidents of ward, marriage, and relief, were abolished, and all lands converted into socage tenure.

TENURE in SOCAGE.

Tenure in socage is where the tenant holdeth of his lord by fealty, suit of court, and certain rent for all manner of service. (1)

The lord shall not have the wardship, but a [38] relief presently after the death of his tenant.

A relief for socage land is a year's rent, and is to be paid presently upon a descent or purchase. As if the land were held by fealty, and ten shillings rent *per annum*, ten shillings shall be paid for relief.

The next of the kin to whom the inheritance may not descend, shall have the wardship of the land and of the heir, until his age of fourteen years, to the use of the heir, at which age the heir may call him to account.

If the guardian die, the heir cannot have an action of account against the executor of the guardian.

The executor of the guardian may not have the wardship, but some other of the next of kin. The husband may not alien the interest of the wife in the guardianship, nor hold it; if she die it may not be sold.

If another man occupy the lands of the heir as warden in socage, the heir may call him to account as guardian.

If the guardian hold the lands after the heir

(1) Or by any other *certain and determinate* service, not being service of chivalry or knights service. *Lit.* § 117.

is fourteen, the heir shall call him to account as his bailiff. (1)

See more concerning socage tenure, Co. Litt. 85. b. 2 Bl. Com. 79. Wright's Ten. 142.

[39]

In Gavilkind.

The next of kin shall have the guardianship of the body and lands, until the heir be fifteen years of age.

CHAP. XX.

DIVERSITIES OF AGES.

A Man hath but two ages. (2)
The full age of male and female is one and twenty.

A woman hath six ages.

The lord her father may distrain for aid for her marriage when she is seven.

(1) The authority of the guardian ceasing by the common law at so early an age as fourteen, was found to be productive of many inconveniences, this occasioned the stat. 12 Car. II. c. 24. allowing parents to appoint guardians to their children till twenty-one. How socage tenure is affected by this stat. *v. d. Co. Litt. 13th ed. 93. b. n. 3.*

(2) According to my Lord Coke (and also the modern authorities) a man has four ages : at twelve he may take an oath of allegiance ; at fourteen he is at years of discretion, and may chuse his guardian, make his will of personality, &c.; at seventeen may be an executor ; and at twenty-one is entirely at his own disposal, *Co. Litt. 78. b. 2 Bl. Com. 463.* it is difficult therefore to conceive what are the particular ages our author alludes to, and why he has limited them to two.

She

She is dowable at nine.

She is able to assent to matrimony at twelve.

She shall not be in ward if she be fourteen.

She shall go out of ward at sixteen.

She may sell or give her lands at one and twenty.

No man may be sworn in any jury before he be twenty-one; before which age all gifts, grants or deeds, as do not affect by delivery of his own hands, are void, and all others voidable, except for necessary meat, drink, and apparel, &c.

An infant may do any thing for his own advantage, as to be executor or such like. An infant shall sue by his next friend, and answer by his guardian. [40]

In Gavilkind.

The heir may give or sell at fifteen years of age.

1. The land must descend, not be given him by will.

2. He must have full recompence.

3. It must be by feoffment, and livery of seisin with his own hands, not by warrant of attorney or any other conveyance.

By the civil law an infant may be an executor at seventeen years of age.

An infant may make a will of his goods at fourteen years of age, and a maid at twelve.

CHAP. XXI.

RENTS.

THERE are three manners of rents; rent-service, rent-charge, rent-seck.

Rent-service is where a man holdeth his lands of his lord by certain rent, &c. (1)

Rent-charge is granted or reserved out of certain lands by deed with a clause of distress.

Rent-seck is a rent granted without a distress; (2) or rent-service, severed from other service, becometh a rent-seck.

[41] The reversion of a rent without a deed is void, if the reversion be not in the resorvor. If a rent be granted from the reversion, it is a rent-seck.

He which is not seised of a rent-seck, is without remedy for the same.

The gift of a penny by the tenant in name of seisin of a rent-seck, is a good possession and seisin.

No rent may be reserved upon any feoffment, gift, or lease, but only to the donor and his heirs, not to any stranger.

A rent-charge is extinct by the grantee's purchase of parcel of the land, but by the purchase of any of his ancestors it shall not; it shall be apportioned like rent-service, according to value of the land; but if the whole land descend of the same inheritance, the rent is extinguished.

(1) And some personal service. *Co. Litt.* 142.

(2) Remedy of distress is now given for all species of rent.
4 *Geo. 2. c. 28.*

By the grant of the reversion the rents and services pass. If rent be granted to a man without more saying, he shall have it for term of his life. If the lord accept of rent or service of the feoffment, he excludeth himself of the arrearages of the time of the feoffment.

For a rent-charge behind one may have an action of annuity, or distrain.

Vid. references at the end of next chapter.

C H A P. XXII.

D I S T R E S S.

FOR what, when, and where a man may distrain.

A man may distrain for a rent-charge, rent-service, heriot-service, and all manner of service, as homage, escuage, fealty, suit of court, and relief, &c. [42]

Heriot custom must be seised, and for amer-ciements in a leet, upon whose ground soever it be in the liberty. A man may not distrain for rent after the lease is ended, (1) nor have debt upon a lease for life, before the estate of frank-tenement be determined.

A man may not distrain in the night but for damage-feasant.

A man may not distrain upon the possessions of the king, but the king may distrain of any lands of his grantee or patentee.

(1) It has been since provided by 8 An. c. 14. s. 6. that lessors may distrain for arrears of rent at any time within six months after the determination of the lease, and during the continuance of the landlord's title and the tenant's possession.

A man may not distrain the beasts of a stranger that come by escape, until they have been levant and couchant on the ground, but for damage-feasant.

A man may not distrain the oxen of the plough, nor a millstone, nor such like, that is for the good of the commonwealth, nor a cloak in a taylor's shop, nor victuals, nor corn in sheafs, but if it be in a cart, for damage-feasant. (1)

A distress must be always of such things as the sheriff may make a replevin.

A man may not sever horses joined together, or to a cart. (2)

[43] If a man put cattle into a pasture for a week, and afterwards *J. N.* doth give him notice that he will keep them no longer, and the owner will not fetch them away, *J. N.* may distrain them damage-feasant.

If a man take beasts damage-feasant, and driving them by the high way to a pound, the beasts enter into the house of the owner, and the taker prayeth the delivery of them, and the owner will not deliver them, a writ of rescous lieth.

If a man distrain goods he may put them where he will; but if they perish, he shall answer for them.

If cattle they ought to be put into a common pound, or else in an open place where the owner may lawfully come and feed them, and notice given to him thereof, and then if they die, it is in default of the owner.

(1) This is to be understood of distress for rent only, and not of distress given in the nature of an execution by any particular stat. as for poor rates, &c.—3 *Salk.* 136.

(2) This has been disputed and does not seem to be yet fully settled. Vid. 1 *Vent.* 36. *Raym.* 18. 1. *Sid.* 422. and *Co. Litt.* 13th ed. 47. a. n. 12.

Cattle taken damage-feasant may be impounded in the same land; but goods or cattle taken for other things may not. (1)

Sheep may not be distrained, if there be a sufficient distress besides. (2)

No man shall drive a distress out of the county wherein it was taken.

No distress shall be driven forth of the hundred, [44] but to a pound overt within three miles.

A distress may not be impounded in several places, upon pain of five pounds and treble damage.

Fees for impounding one whole distress, four pence.

The executor or administrator of him which had rent or fee-farm in fee, in fee tail, or for life, may have debt against the tenant that should pay it, or distrain; and this is by the stat. 32 *H. 8. c. 28.*

So may the husband after the death of his wife, his executor or administrator. So may he which hath rent for another man's life, distrain for the arrearages after his death, or have an action of debt. 32 *H. 8. c. 37.*

But if the landlord will distrain the goods or cattle of his tenant, and do sell them, or work them, or convert them to his own use, he shall be executor of his own wrong. (3)

(1) Distresses may now, by stat. 11 *Geo. 2. c. 19.* be impounded and sold on the premises.

(2) The author, I imagine, alludes to stat. 51 *Hen. 3. c. 4.* but quære whether the subsequent statutes concerning distresses have not virtually annulled this privilege. *Vid. 2 Wil. & Mar. c. 5. 11 Geo. 2. c. 19.*

(3) A distress at the common law being considered only as a pledge to procure satisfaction, could not be disposed of; but this being found inconvenient, when made for recovery of rent in arrear, it was provided by 2 *Wil. & Mar. c. 5.* that goods, &c. distrained for rent, should after five days notice be appraised and sold.

See more concerning rents and distress, Co. Litt. 47. a. 141. a. Lil. Conv. 277. Wood In. 177. 2 Bl. Com. 41. 3. ibid 13.

C H A P. XXIII.

DISSEISIN of RENTS.

[45] **T**HREE causes of disseisin of rent-service, rescous, replevin, inclosure.
Four of rent-charge, denier, and inclosure.
Forestalling is a disseisin of all.

Forestalling is when the tenant doth with force and arms waylay or threaten in such manner, that the lord dareth not distrain or demand the rent.

Denial is, if there be no distress on the land, or if there be none ready to pay the rent, &c.

And of such disseisins a man may have an action of novel disseisin against the tenant, and recover his rent and arrearages, and his damage and costs; and if the rent be behind another time, he shall have a re-disseisin, and recover double damage.

RESCOUS and POUND-BREACH.

If the lord distrain when there is no rent nor service behind, the tenant may not rescue; otherwise if another distrain wrongfully; but no man may break the pound, although he did tender amends before the cattle were impounded.

If the lord come to distrain, and see the beasts, and the servant drive them out of his fee, the lord may not have rescous, because he had not the possession, but he may follow them and distrain, but not damage-feasant.

Vid. references at the end of the preceding Chapter.

C H A P.

COMMON.

COMMON is the right that a man hath to put his beasts to pasture, or to use and occupy the ground that is another man's.

There be divers commons, *viz.* common in gross, common appendant, common appurtenant, common because of neighbourhood. *See Law Terms.*

The lords of wastes, woods, and pastures, may approve against their tenants and neighbours with common appurtenant, leaving them sufficient common and pasture to their tenants. (1)

As if one tenant surcharge the common, the other tenants may have against him a writ *de admesuratione pasturæ*, but not against him that hath common for beasts without number; neither may the lord inclose from such tenants, if he do, the tenant may bring an assise against him, and recover treble damage; but the lord may have a *quo jure*, and make the tenant shew by what title he claimeth.

Vid. Co. Litt. 122. a. 2 Bl. Com. 32. Wood In. 196.

(1) The liberty of approving is not confined to the lords of manors, &c. any other person having the fee may approve. 4 T. R. 445.

THE king's high-way is that which leadeth from village to village.

A common high-way is that which leadeth from a village into the fields.

A private way is that which leadeth from one certain place unto another. 3 *Ed.* 3.

In the king's high-way the king hath only passage for himself and his people; and the franktenement and all the profits are in the lord of the soil, as they be presented at the leet.

Of a common high-way the franktenement and the profits are to him that hath the land next thereto adjoining; and if it be stopped, and I be damnified by it, I have no remedy but by presentment in the leet.

If a private way be straitned, or if a bridge there which another ought to repair, be decayed, an action of the case lieth; but if the way be stopped, an assise of nuisance lieth, and the lessee may have it after the lessor's years begin, or the lessee may have an action of the case. If the most part of a water-way be stopped, an assise will lie.

Concerning ways, vid. Co. Litt. 56. a. 2 Bl. Com. 35. Wood In. 197. and particularly 2 Com. Dig. 397, &c.

LIBERTIES.

A Liberty is a royal privilege in the hands of a subject.

All liberties are derived from the crown, and therefore are extinguished if they come to the crown again by escheat, forfeiture, or such like; for the greater doth drown the lesser.

One may have a park, a leet, waif, stray, wreck of sea, and *tenura placitorum*, by prescription, and without allowance in eyre, but not cognisance of plea, nor *catalla felonum vel fugitivorum aut utlagatorum*. (1)

A liberty may be forfeited by misusing; as to keep a market otherwise than it is granted.

A liberty may be forfeited for not using, when it is for the good of the commonwealth; as not to exercise the office of the clerk of the market, but not to use a market, is not.

Whatsoever is in the king by reason of his prerogative, may not be granted or pardoned by general words, but by special.

Concerning liberties or franchises, vid. Wood Inst. 200. 2 Com. Dig. 391. 2 Blac. Com. 37.

(1) Unless as incident to a county palatine, &c. which may be claimed by prescription. *Co. Litt. 114. b. sed vid. 2 Bl. Com. 37.*

[49]

CHAP. XXVII.

OF CHATTELS.

REAL.

CHATTELS real are guardianships, leases for years, or at will, &c: (1)

Guardianship is a commodity of having the custody of the body or lands, or both, where the heir is within age: and the lord of whom the land is holden by knight service shall have the same to his own use; for it is a chattel real, and therefore his executor shall have it.

The guardian must not do waste, nor enfeoff, upon pain of losing the wardship: but he must maintain the building out of the issues of the lands, and so restore it to the heir.

If the committee of the king commit, the wardship shall be committed to another; if the grantee, he shall lose the wardship.

And one of the friends of the ward, being his next friend, that will, may sue for him.

If a lease be made to a man and his heirs for twenty years, it is a chattel, and his executor shall have it: otherwise if a man will a lease to a man and his heirs, here the word heirs are words of purchase, and his heirs shall have it.

[50]

If a man grant *proximam advocatorem* to J. S. and his heirs, it is but a chattel, for it is but for *unica vice*.

Writings pawned for money lent are chattels.

If a woman have execution of lands by statute

(1) And generally all such things as favour of the reality,
1 Inst. 118. Co. Litt. 118. b.

merchant,

merchant, and taketh a husband, he may grant it, for it is a chattel.

PERSONAL.

Chattels personal are gold, silver, plate, jewels, utensils, beasts, and other chattels and moveable goods whatsoever, obligations, and corn upon the ground.

All goods, as well moveable as unmoveable, corn upon the ground, obligations, right of actions, money out of bags, and corn out of sacks, *sunt catalla*.

Money is not to be passed by the grant of all his goods and chattels; nor hawks, nor hounds, nor other things *feræ naturæ*, for the property is not in any, not after they are made tame, longer than they are in his possession; as my hounds following me, or my man, or my hawk flying after a fowl, or my deer hunting out of my park; but if they stray of their own accord, it is lawful for any man to take, and the heir shall have them. (1)

All chattels shall go to the executors; vats and furnaces fixed in a brewhouse, or dye-house by the lessee; if they be fixed by tenant in fee, the heir shall have them. (2)

[51]

Now something hath been said concerning possessions, it followeth that it be shewed, how they may be conveyed from one man to another.

(1) It is said that if a wild *swan* be taken and marked, it will continue the owner's property, though turned loose again. 7 Co. 16.

(2) See more concerning personal chattels, *infra*, chap. xlii. also 2 Blac. Com. 120. 385. Co. Litt. 18. b. 147. b.

C H A P. XXVIII

OF CONVEYANCES.

IN every conveyance there must be a grantor and a grantee, and something granted.

The conveyance of some persons is void, of others voidable.

Conveyance of a woman covert is void, without the consent of her husband; and it ought to be made in her or his name, except it be done as executor to another.

Of an infant that which doth not take effect with the delivery of his own hands, is void; and an action of trespass will lie against him for taking the things given.

Otherwise it is but voidable, except it be as executor, or for necessary meat and drink, &c. for his advantage.

[52] Voidable of *non sanæ memoriæ*, or made by dures royal.

Voidable by the parties themselves and their heirs, and by them that shall have their estates, except *non sanæ* himself.

Grants by fine, voidable by a writ of error, by an infant during his nonage, and by the husband for a fine levied by his wife alone during their marriage.

Conveyance of some persons cannot be good for ever without the consent of others, as the dean without the chapter, the mayor without the commonalty, and of other bodies politick that have a common seal, or of a parson without the patron and ordinary.

If there be no condition in the conveyance, it shall be intended the elder.

A conveyance made to a female covert shall be

be good and of effect, until her husband do disagree. (1)

An infant may be grantee, so may a woman outlawed, a villain, a bastard, and a felon.

A bastard can have no heir but the issue of his body lawfully begotten.

An infant at the age of discretion by his actual entry, and a woman against the will of her husband may be a disseisor or a trespassor.

In all conveyances there must be one named, which may take by force of the grant, at the beginning of the grant. [53]

A grant made to the right heirs of one that is dead is good, or *custodibus Eccl.* is good for goods.

All chattels, real or personal, may be granted or given without a deed. (2)

Rent-service, rent-seck, rent-charge, common of pasture, or of turbary, reversion, remainder, advowson, or other things, which lie not in manual occupation, may not be conveyed for years, for life, in tail, or in fee, without writing.

The mayor or commonalty, or such like, cannot make a lease for years without a deed.

For a short but perspicuous history of alienations, vid. 2 Bl. Com. 287.—Of fraudulent conveyances, see Lil. Conv. 391.

(1) She may also disagree to it after her husband's death (whether he agree or not) unless it be made by matter of record, as may her heirs, unless she agree to it; but a conveyance by a feme covert is absolutely void. *Perk. § 154.*

(2) By stat. 29 Car. 2. c. 3. All leases, estates of freehold, or terms for years, not put into writing, and signed by the party making the same, shall have no greater effect than estates at will, except leases not exceeding three years, wherein the reserved rent shall be two thirds at least of the improved value.

C H A P. XXIX.

OF DEEDS.

THREE things needful and pertaining to every deed, writing, sealing, and delivering. (1)

[54] In the writing must be shewed the persons names, their dwelling place, and degree. Things granted upon what consideration, the estate, whether absolute or conditional, with the other circumstances, and the time when it was done. (2)

No grant can be made but to him that was party to the deed, except it be by way of remainder.

The words must be sufficient in law to bind the parties: as if a man grant *omnes terras certa sua*, a lease for years passeth not but for franktenement, at least *nec per omnia bona sua*.

Exceptio semper ultimo ponenda est.

The *habendum* must include the premisses.

A condition cannot be reserved but by the

(1) Sir *W. Blackstone* mentions four other requisites to a good deed, *viz.* reading to the parties, a good consideration, signing, and attestation, *vid. 2 vol. Com. 295.* it is now also further necessary that the paper or parchment on which it is written be properly stamped.

(2) It is not absolutely necessary that the date should be inserted in the deed; it is sufficient if the delivery of it can be proved. *2 Co. 4. b.*

grantor,

grantor, and it is proper to follow the *habend'* presently. (1)

The *habend'* or condition must not be repugnant to the premisses, if it be it is void, and the deed will take effect by the premisses.

A warrant is good although it extend not unto all the lands, nor to all the feoffees, or made by one of the feoffors. (2)

If it be rased or interlined in the date, or in any material place, it is very suspicious.

See more concerning the different parts of deeds, 2 Bl. Com. 298. Wood In. 224. Lil. Conv. tit. Habendum, Covenant, &c. and for the exposition of deeds, vid. Lil. Conv. 161. Shep. T. chap. 5.

OF SEALING.

[55]

A writing cannot be said to be a deed if it be not sealed, although it be written and delivered, it is but an escrow.

And if it were sufficiently sealed, yet if the print of the seal be utterly defaced, the deed is insufficient, it is not my deed. (3)

It may not be pleaded, but it may be given in evidence.

OF DELIVERY.

A deed taketh effect by the delivery, and if the first take any effect, the second is void.

(1) Of conditions, vid. *infra*, chap. xxix.

(2) Of warranties. vid. *infra*, chap. xl.

(3) Any defect of this sort, arising from accident, would be supplied in equity. Vid. 2 Cb. Rep. 100. 2 Vern. 473, 6.

A jury shall be charged to inquire of the delivery, but not of the date; yet every deed shall be intended to be made when it doth bear date.

Vid. Co. Litt. 13th ed. 36. a. n. 5, 6, 7, 8. on the delivery of deeds.

Diversity in delivering of a Writing as a DEED or ESCROW. (1)

This delivery ought to be done by the party himself, or by his sufficient attorney, and so it shall bind him whosoever wrote or sealed the same.

[56] If one be bound to make assurance he need not to deliver it, unless there be one to read it to him before.

And if any writing be read in any other form to a man unlearned, it shall not be his deed although he seal and deliver it.

See further as to the delivery of a deed as an escrow, 2 Rol. ab. tit. Fait M.

There are two Sorts of DEEDS.

A deed poll, which is the deed of the grantor; a deed indented, which is the mutual deed of either parties. But in law, one is the deed of the grantor, and the other the counter part. And if any variance be in them, it shall be taken as it is in the deed of the grantor; and if the grantor seal only, it is good.

Upon deeds in general, see 2 Bl. Com. 295. Shep. T. chap. 4. Lil. Conv. 388.

(1) A writing is delivered as an *escrow*, when it is delivered not to the grantee himself, but to a third person, to hold till some condition on the part of the grantee be performed; till which it is no deed, and may be revoked on failure. *Co. Lit. 36. a. infra, p. 95.*

F E O F F M E N T S. 79

C H A P. XXX.

BARGAINS and SALES.

NO manor, lands, tenements, or other hereditaments can pass, alter, or change from one man to another, whereby an estate of inheritance or freehold is made, or taketh effect in any person or persons, or any use thereof is made, by reason only of any bargain and sale thereof, (1) except the same be made by writing indented, sealed, and inrolled in one of the courts of record at *Westminster*, or within the same court or county where the tenements so bargained do lie, before the *custos rotulorum* and two justices of peace, and the clerk of the peace, or two of them, whereof the clerk of the peace to be one, and that within six months after the date of such writing indented. 27 H. 8. c. 16. [57]

The inrolment shall be indented the first day of the term, and shall have relation to the delivery of the deed against all strangers.

For the nature and properties of, and the rules relating to a bargain and sale, vid. Shep. T. chap. 10. Lil. Conv. 14. 375.

C H A P. XXXI.

F E O F F M E N T S.

A Feoffment is an estate made by the delivery of possession and seisin by party, or his sufficient attorney. (2)

(1) This stat. does not extend to bargains and sales for years, which are good without inrolment, and the possession is transferred by the stat. of uses. 2 Co. 14. *Dyer* 309.

(2) Since the stat. 27 Hen. 8. c. 10. (which by transferring the possession to the use rendered livery of seisin unnecessary to pass the freehold) and the introduction of uses and trusts, deeds of feoffment have been almost entirely superseded by conveyances by lease and release. *Vid. infra, p. 97.*

A man cannot make livery of seisin before he have the possession.

A jointenant cannot enfeoff his companion.

A copartner may make a feoffment of his part, or release.

A man cannot enfeoff his wife.

[58] A disseisor cannot enfeoff the disseisee; for his entry is lawful upon the disseisor.

Such persons as have possession in lands for years or for life, &c. cannot take by livery and seisin of the same lands.

If a feoffment be made, and the lessee for years give leave to the lessor to make livery and seisin of the premises, saving to himself his lease, &c. and he doth, the term is not surrendered, for the lease had an interest which could not be surrendered without his consent to surrender, and here his intent to surrender doth not appear; wherefore he may enter and have his term, and the rent is renewed: but it is otherwise with a lessee for life, and the rent is extinct.

The lessor cannot make livery and seisin against the will of the lessee being on the land; but he may grant the reversion, and if the lessee do attorn, the freehold will pass without livery of seisin.

See the law relating to a deed of feoffment, Lil. Conv. 138. Shep. T. chap. 15. 2 Bl. Com. 310. Vid. also the form and operation of this species of deed, Co. Litt. 13th ed. 271. b. n. 1.

LIVERY of SEISIN.

Livery of seisin is a ceremony used in conveyance of lands, that the common people might know the passing or alteration of the estate.

It

It is requisite in all feoffments, gifts in tail, and leases for life, made by deed or without deed. [59]

No freehold will pass without livery of seisin, except by way of surrender, partition, or exchange, or by matter of record, or by testament. (1)

Livery of seisin must be made in the life-time of him that made the estate.

Dona clandestina sunt semper suspiciosa.

By delivery of seisin in one county, the lands in another county will not pass.

Livery within view is good, if the feoffee do enter in the life-time of the feoffor.

Livery may not be made of an estate to be given *in futuro*, for no estate in franktenement may be given *in futuro*, but shall take effect presently by livery and seisin.

Of USES.

The statute of 27 H. 8. c. 10. hath advanced uses, and hath established surety for him that hath the use against the feoffees: for before the statute, the feoffees were owners of the land, but now it is destroyed, and the *cestuy que use* is the owner of the same: before the possession ruled the use, but since the use governeth the possession. (2) Indentures subsequent be suffi- [60]

(1) *Vid. p. 79. n. 1. 2.*

(2) The intent of this stat. was to abolish conveyances to uses; but the strict construction put upon it by the courts has restored the effect of them in the doctrine of *trusts*, which are now applied to the same purposes as uses were before the stat. *Vid. 1 Alk. 591.*

cient to direct the uses of a fine or recovery precedent, when no other certain and full declaration was made before.

For the doctrine of uses, see Shep. T. c. 24. Gilb. Uses 3. Lil. Conv. 338. Co. Litt. 271.

A T T O R N E Y.

An attorney ought to do every thing in the name, and as the act of him which gave him the authority; as leases in name of the lessor; but he must say, By virtue of his letter of attorney I do deliver you possession, and seisin of, &c. for, &c.

An attorney must first take possession before he can make livery of seisin.

If an attorney do make livery of seisin otherwise than he hath warrant, then it is a disseisin to the feoffor. (1)

An attorney must be made by writing sealed, and not by word.

C H A P. XXXII.

E X C H A N G E.

IN exchange both the estates must be equal: (2) there must be two grants, and in every grant mention must be made of this word *Exchange*.

[61] It may be done without livery of seisin if it be in one shire, or else it must be done by indenture,

(1) Concerning livery by attorney, vid. *Co. Lit.* 13th ed. 52. a. n. 2.

(2) *Viz.* equal in *interest*, as fee simple for fee simple, &c. but it is not necessary that they should be of equal *value*. *Lit. f.* 64. 2 *Blac. Com.* 323.

and by this word *Exchange*, or else nothing passeth without livery.

Exchange importeth in the law a condition of re-entry, and a warranty voucher, and recompence of the other land that was given in exchange. An assignee cannot re-enter, nor vouch, but rebate; exchanger may re-enter upon an assignee. And the same condition defeated in part is defeated in the whole. And the same law is in partition.

Vid. Co. Litt. 13th ed. 50. b. n. r. 51. b. n. 3. Lil. Conv. 144. Shep. T. chap. 16. 2 Bl. Com. 323.

CHAP. XXXIII.

GRANTS.

GRANTS must be certain. A grant to *J. S.* or *J. N.* is void for the incertainty, although it be delivered to *J. S.* the delivery of the deed will not make a void grant good, or to take effect.

The lord cannot grant the wardship of his living tenant, because of the incertainty who shall be his heir, unless he name some person.

When any thing is granted that is not certain, as one of my horses, then the choice is in [62] the grantee.

When several things are granted, then it is in the choice of him that is to do the first act.

A man cannot charge or grant that which he never had.

A man may charge a reversion.

A parson may grant his tithes, or the wool of his sheep, for years.

A thing in action, a cause of suit, right of entry, or a title for a condition broken, or such like, may not be given or granted to a stranger, but only to the tenant of the ground, or to him that hath the reversion or remainder. (1)

A thing that cannot begin without a deed may not be granted without a deed: (2) as a rent-charge, fair, &c. Every thing that is not given by delivery of hands, must be passed by deed. The right of a thing real or personal may not be given in nor released by word. A rent of condition or re-entry may not be reserved to one that is not party to the deed.

All things that are incident to others, pass by the grant of them that they are incident unto. (3)

[63] A man by his grant cannot prejudice him that hath an elder title.

If no estate be expressed in the grant, and livery and seisin be made, then the grantee hath but estate for life: but if there be such words in the grant, which will manifest the will of the grantor, so his will be not against the law, the estate shall be taken according to his intent and will.

All grants shall have a reasonable construction, and all grants are made to some purpose, and therefore reason would they should be construed to some purpose. (4)

All grants shall be taken most strong against him that made it, and most beneficial to him to whom it is made.

(1) As to the distinction between the grant of things in action, &c. to a stranger and to the tenant of the land, *vid.* 20 Co. 48.

(2) *Vid. supra* Max. 10.

(3) *Ibid.* Max. 13.

(4) *Ibid.* Max. 45.

To grants of reversion, or of rents, &c. there must be attornment, otherwise nothing passeth, if it be not by matter of record.

The principal rules relating to the construction of grants may be found Hil. notes to Shep. T. end of chap. 12. vid. also concerning this species of deed, 2. Bl. Com. 317. Lil. Conv. 212. 403. Co. Litt. 9. a.

CHAP. XXXIV.

ATTORNMENT.

ATtornment is the agreement of the tenant to the grant by writing or by word; as to say, I do agree to the grant made to you, or I am well contented with it, or I do attorn unto you, or I do become your tenant, or I do deliver unto the grantee a penny by way of seisin of a rent, or pay, or do but one service only in the name of the whole, it is good for all. (1) [64]

It must be done in the life-time of the grantor.

Without attornment a feignory, a rent-charge, a remainder, or a reversion, will not pass but by matter of record.

Without attornment services pass not by the sale of the manor, nor from the manor but by bargain and sale inrolled.

Attornment must be made by the tenant of the freehold, when a rent-charge is granted.

(1) By stat. 4 Ann, c. 16. s. 9. and 11 Geo. 2. c. 19. s. 11, attornment is in all cases become unnecessary; it is however provided by the first of these stat. that no tenant shall be prejudiced by payment of rent, &c. before notice given him of the grant.

By

By the attornment of the termor to the grantee of a reversion, with livery, and the rent also, though no mention be made thereof. Before attornment a man may not distrain, nor have any action of waste.

By fine the lord may have the wardship of the body and lands, before the attornment of his tenant.

The end of attornment is to perfect grants, and therefore may not be made upon condition or for a time.

A tenant that is to perfect a grant by attornment cannot consent for a time, nor upon a condition, nor for part of a thing granted; but it shall enure the whole absolutely.

[65] If the tenant have true notice of all the grant, then such attornment is void.

Attornment necessary upon a devise.

C H A P. XXXV.

L E A S E S.

A Lease for years must be for time certain, and ought to express the term, and when it should begin, and when it should end, certainly. (1) And therefore a lease for a year, and so from year to year during the life of *J. S.* but for two years it may be made by word or writing. If I lease to *J. N.* to hold until one hundred pounds be paid, and make no livery of seisin, he hath estate only at will.

A lease from year to year, so long as both the parties please, after entry in any year it is a

(1) Concerning the degree of certainty requisite in leases, *vid. 1 Mod. 180. 1 Stra. 655.*

lease for that year, &c. till warning be given to depart. (1) 14 H. 8. 16.

A lease beginning from henceforth shall be accounted from the day of the delivery; for the making shall be taken inclusive from the day of the making, or of the date exclusive. (2)

If lands descend to the heir before his entry, he may make a lease thereof.

A man lets a house *cum pertin'*, no lands pass: (3) but if a man let a house *cum omnibus terris eidem pertin'*, there the lands thereunto used pass. [66]

If a man lets lands wherein are coal-mines, quarries, and such like, if they have been used the tenant may use them, if they be not open; if the tenant for them employ them not on the land, it is waste: likewise marl. The land is the place where the rent is to be paid and demanded, if no other place between the parties be limited.

Trespass is not given for paying of the rent to the lessor, howsoever it be payable there.

And if a man let lands without impeachment of waste, and a stranger cut down the trees, and the lessee doth bring an action of trespass, he shall not recover for the value of the trees, but for the crop and bursting of his close, and the heir of the lessor shall have such trees, and not the executor of the lessee, unless they be cut by

(1) Such a lease is good for two years certain, and afterwards an estate at will. *Bul. N. P. 84. 1 Will. 262.*

(2) A lease to commence *from the day of the making*, made in pursuance of a *power*, shall be construed inclusively or exclusively, so as to effectuate the intention. *Cow. 714.*

(3) But it has been held that a close adjoining to the house, and also orchards, gardens, yards, and curtilages will pass by the word *appurtenances*. *Plow. 170. Cro. Jac. 526.*

the lessee, and enjoyed by the grantee without waste.

[67] Lessee for years or for life, tenant in dower or by the curtesy, or tenant in tail after possibility, &c. have only a special interest or property in the trees, being upon the ground growing as a thing annexed unto the land, so long as they are annexed thereunto.

But if the lessee or any other sever them from the land, the property and interest of the lessee in them is determined, and the lessor may take them as things that are parcel of his inheritance, the interest of the lessee being determined.

To accept the rent of a void lease will not make the lease good, but avoidable it will.

If the husband and wife do purchase lands to them and their heirs of the husband, and he make a lease, and die, his wife may enter, and avoid the lease for her life; but if she die, leaving the husband, who afterward dies before the term ends, the lease is good to the lessee against the heir.

Where it is covenanted and granted to *J. S.* that he shall have five acres of land in *D.* for years, this is a good lease, for *concessit* is of such force as *dimisit*.

If a man make a lease for ten years, and afterwards maketh another lease for twenty-one years, the later shall be a good lease for eleven years, when the first is expired.

[68] If the lessee at his cost do put glass into the window, he may not take the same away again, but he shall be punished for waste: and

(1) This special interest or property extends principally to housebote, ploughbote, and haybote, viz. necessary wood for firing, implements of husbandry and repairs. *Co. Lit.* 41. a. so.

so of wainfcot and fieling, if it be not fixed with screws.

Tenant in tail may make a lease for such lands or inheritance, as have been commonly letten to farm, if the old lease be expired, surrendered or ended, within one year after the making of the new; but not without impeachment of waste, nor above twenty-one years, or three lives, from the day of the making, reserving the old rent, or more, 32 *H. 8.* by indenture of lease, by tenant in tail, for twenty-one years, made according to the form of the statute, rendering the ancient or more rent. If the tenant in tail die, it is a good lease against his issue; but if a tenant in tail die without issue, the donor may avoid this lease by entry. 32 *H. 8.* 28. And if he in the remainder do accept the rent, it shall not tie him, for that the tail is determined, the lease is determined and void. *Ed. 6.* 19.

The husband may make such a lease of his wife's lands by indenture, in the name of the husband and wife, and she to seal thereunto, and the rent must be reserved to the husband and his wife, and to the heirs of the wife, according to her estate of inheritance. (1)

A lease made by the husband alone, of the lands of his wife, is void after his death; but the lessee shall have his corn. (2) [69]

By the husband and wife voidable, if it be not made as aforesaid.

If a man do let lands for years, or for life, reserving a rent, and do enter into any part thereof,

(1) In leases made by a husband in right of his wife the wife must join, and the same requisites must be observed as in leases by tenant in tail by virtue of stat. 32 *Hen. 8. Co. Lit.* 45. a.

(2) Such a lease seems not to be void absolutely, but only voidable by the wife's entry. *Hob. 5. Cro. Jac.* 332.

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and take the profit thereof, the whole rent is extinguished, and shall be suspended during his holding thereof.

The acceptance of a re-demise to begin presently, is suspension of the rent before any entry: otherwise of a re-demise to begin *in futuro*.

See an excellent treatise on Leases, in Bac. Ab. tit. Leases, and Terms for Years, vid. also Lil. Conv. 9. 410. Shep. T. c. 14. Co. Litt. 43. 301. Wood In. 255. 2 Bl. Com. 317.

RESERVATIONS and EXCEPTIONS.

There are divers words by which a man may reserve a rent, and such like, which he had not before, or to keep that which he had, as *tenendum, reservandum, solvendum, faciendum*, it must be out of a messuage, and where a distress may be taken, and not out of a rent, and must be comprehended within the purport of the same word.

Exceptions of part ought always to be of such things which the grantor had in possession at the time of the grant.

[70] The heir shall not have that which is reserved, if it be not reserved to him by special words.

If a man make a feoffment of lands, and reserve any part of the profits thereof, as the grass or the wood, that reservation is void; because it is repugnant to the feoffment.

A man by a feoffment, release, confirmation, or fine, may grant all his right in the land, saving unto him his rent-charge, &c. Things that are given only by taking and using, as pasture for four bullocks, or two loads of wood, cannot be reserved but by way of indenture, and then they shall

shall take effect by way of grant of the grantor, during his life, and no longer, without special words.

Exceptions of things, as wood, mines, quarry, marl, or such like, if they be used, it is implied by the law, that they shall be used; and the things without which they cannot be had, is implied to be excepted, although no, &c.

But otherwise, if they be not used, then the way and such like must be excepted.

An assignee may be made of lands given in fee, or for life, or for years, or of a rent-charge, although no mention be made of the assignee in the grant.

But otherwise it is of a promise, covenant, or [71] grant or warranty.

If a lessee do assign over his term, the lessor may charge the lessee or assign at his pleasure.

But if the lessor accept of the rent of the assignee, knowing of the assignment, he hath determined his acceptation, and shall not have an action of debt against the lessee, for rent due after the assignment. (1)

If after the assignment of the lessee the lessor do grant away his reversion, the grantee may not have an action of debt against the lessee.

If a lessee do assign over his interest and die, his executor shall not be charged for rent due after his death.

If the executor of a lessee do assign over his interest, an action of debt doth not lie against him for rent due after the assignment.

If the lessor enter for a condition broken, or the lessee do surrender, or the term end,

(1) Nor can he distrain, but he may have an action on the lessee's covenant for payment of the rent. 1 Saund. 240.
the

92 RESERVATIONS and EXCEPTIONS.

the lessor may have an action of debt for the arrearages. (1)

[72]

A lease for years rendring rent, with a condition, that if the lessee assigneth his term, the lessor may re-enter. The lessee assigneth, the lessor receiveth the rent of the hands of the assignee, not knowing of the assignment, it shall not exclude the lessor of his entry.

A thing in a condition may be assigned over for good cause as just debt: as whereas a man is indebted to me twenty pounds, and another do owe him twenty pounds, he may assign over his obligation unto me in satisfaction of my debt, and I may justify the suing for the same in the name of the other at my own proper costs and charges.

Also where one hath brought an action of debt against J. N. which promiseth me, that if I will aid him against J. N. I shall be paid out of the sum in demand, I may aid him.

An assignee of lands, if he be not named in the condition, yet he may pay the money to save his land.

But he shall receive none, if he be not named: the tender shall be to the executor of the feoffees.

Assignee shall always be intended, he that hath the whole estate of the assignor that is assignable. (2)

A condition is not assignable, and not of an executor or administrator. If there be such an assignee, the law will not allow an assignee in the law, if there be an assignee in deed: so long as any part of the estate remaineth to the assignor, the tender ought to be made to him or his heirs, it serveth; yet a colourable payment

[73]

(1) Or he may distrain within six months after the term end, *vid. p. 65. n. 1.*

(2) Though the rent and power of re-entry be reserved to the lessee, yet if the *whole* term be parted with it will be an *assignment* and not as *under lease*. Doug. 187.

to the heir shall not vest the estate out of the assignee, as a true payment will, *viz.* Covenant.

As to reservations, vid. Co. Litt. 47. a. and exceptions, Lil. Conv. 140.

C H A P. XXXVI.

SURRENDERS.

A Surrender is an instrument testifying with apt words, that the particular tenant of lands or tenements, for life or years, doth sufficiently consent, that he which hath the next immediate remainder or reversion thereof, shall also have the particular estate of the same in possession; and that he yieldeth or giveth the same to him for ever. Surrender ought forthwith to give a present possession of the thing surrendered unto him which hath such an estate, where it may be drowned.

A jointenant cannot surrender to his fellow.

Estates of things that may not be granted without a deed, may be determined by the surrender of the deed to the tenant of the land. (1)

Lessee for years cannot surrender before his term begin; he may grant, he cannot surrender part of his lease.

Surrenders are in two Manners, in DEED,
in LAW.

[74]

A surrender in law, is when the lessee for years doth take a new leate for more years. (2)

(1) Surrenders must now, by stat. 29 Ch. 2. c. 3. be by deed or note in writing; and *Vid. Gilb. Ca. Eq. 236.*

(2) Though the new lease be for a *lfs.* number of years than the old one, it is equally a surrender in law. *Skep. Touch. 301.*

A sur-

A surrender in deed must have sufficient words to prove the assent and will of the surrenderer to surrender, and that the other do also thereunto agree.

The husband may surrender his wife's dower for his life, and her lease for ever.

By deed indented a man may surrender upon condition.

See further as to the nature and effect of a surrender, 2 Bl. Com. 326. Wood Inst. 273. Shep. T. c. 17. Lil. Conv. 290, 459. Co. Lit. 13th ed. 337. b. n. 1.

CHAP. XXXVII.

RELEASES.

A Release is the giving or discharging of a right or action, which a man hath or claimeth against another, or out of or in his lands.

A release or confirmation made by him, that at the time of the making thereof had no right, is void: If a right come to him afterwards, unless it be with warranty, and then it shall bar him of all right that shall come to him after the warranty made.

[75] Release or confirmation made to him that at the time of the release or confirmation made had nothing in the lands, is void, it behoveth him to have a freehold or a possession and privity.

A release made to a lessee for years before his entry is void. (1)

(1) So it was at common law, but since the stat. 27 Hen. 3. which transfers the possession to the use, no entry is necessary where there is a sufficient consideration to raise an use.

A man

A man may not release upon a condition, nor for time, nor for part; but either the condition is void, and the time is void, and the release shall enure to the party to whom it is made for ever, for the whole, by way of extinguishment. But a man may deliver a release to another as an escrow, to deliver to J. S. as his act and deed, if J. S. do perform such a thing, or release upon a condition by deed indented, may be good.

A jointenant of a rent-charge may release, yet all the rent is not extinct, nor yet if he purchase the lands, his fellow shall have the rent still.

If the grantee release parcel of a rent-charge to the grantor, yet all the rent is not extinct.

A release to charge an estate ought to have these words, heirs, or words to shew what estate he shall have.

A release made to him that hath a reversion or a remainder in deed, shall serve and help him that hath the franktenement: so shall a release made to a tenant for life, or a tenant in tail, enure to him in the reversion or remainder, if they shew it; and so to trespassors and feoffors, but not to disseisors.

A release of all manner of actions doth not take away an entry, nor the taking of one's goods again, nor is any plea against an executor.

A release of all demands extinguisheth all actions real and personal, appeals, executions, rent-charge, common of pasture, rent-service, and all right and seifure, and all right in lands and property in chattels; but not a possibility

*

or

[76]

or future duty, (1) as a rent payable after my death, and such like.

See a general outline of the doctrine of releases, Co. Lit. 13th ed. 264a. n. 1. Vid. also Lil. Conv. 55. 432. Shep. T. c. 19. 2 Bl. Com. 324. Wood In. 265. Gil. Ten. 53.

C H A P. XXXVIII.

C O N F I R M A T I O N.

Confirmation is when one ratifieth the possession, as by deed to make his possession perfect, or to discharge his estate, that may be defeated by another's entry.

[77] As if a tenant for life will grant a rent-charge in fee, then he in the reversion may confirm the same grant; whereas a man by his entry may defeat an estate, there by his deed of confirmation he may make the estate good.

A confirmation cannot charge an estate that is determined by exprefs condition or limitation. To confirm an estate for an hour, if it be for tenant for life, it is good for life; if to tenant in fee, for ever.

A lease for years may be confirmed for a time, or upon condition, or for a piece of the land: but if a franktenement be, it shall enure to the whole absolutely.

A confirmation to charge an estate, must have words to shew what estate he shall have.

(1) A release of all actions will discharge a bond debt payable at a future day, for it is *debitum in presenti*, though *solvendum in futuro*. Co. Lit. 292. b.

To confirm the estate of tenant for life to his heirs, cannot be but by *habend'* the land to him and his heirs; and therefore it is good to have such an *habend'* in all confirmations.

In a confirmation new service may not be reserved, and old may be abridged.

A confirmation made to one disseisor shall be voidable to the other; so shall not a release.

See the law relating to a deed of confirmation, Co. Lit. 13th ed. 295. b. n. 1. also Lil. Conv. 43. Shep. T. c. 18. Gil. Ten. 75. Wood Inst. 269. 2 Bl. Com. 325.

Another species of conveyance (which our author has omitted, because, with many other lawyers of his time, he doubted its validity) is by Lease and Release.—It is effected thus—A lease, for a pecuniary consideration, of the premises to be conveyed is made to the intended grantee, for a year; this vesting in him the use of the term, the stat. 27 Hen. 8. immediately annexes the possession, and enables him to accept a release of the freehold and reversion. Whatever objections there might formerly have been to this mode of conveyance, it is now too firmly established to be shaken, and by superseding the necessity of livery of seisin, is become the most common assurance of land.

See further concerning the nature and operation of this conveyance, Lil. Conv. 236. 139. 2 Mod. 249. Raym. 798. 3 Bur. 1794.

In the course of the preceding chapters Assurances by Fine, Recovery, and Assignment, have been incidentally mentioned.

Of Fines, vid. Cruise on Fines, passim. Shep. T. c. 2. Lil. Conv. 399. 2 Bl. Com. 348.

Recoveries, Cruise on Recov. pas. Shep. T. c. 3. Lil. Conv. 430. 2 Bl. Com. 357.

Assignments, Lil. Conv. 372. 2 Bl. Com. 326.

[78]

CHAP. XXXIX.

CONDITION.

THERE are two manners of conditions, one expressed by words, another implied by the law; the one called a condition in deed, the other a condition in law.

Estate made, and the condition against the law, the estate is good, the condition is void.

If the estate beginneth by the condition, then both are void.

Bonds with conditions expressly against the law are void.

Conditions repugnant, the estate good, the conditions void.

Conditions impossible are void, the estate good: it shall not enlarge any estate.

By pleading a man may not defeat an estate of franktenement, by force of a condition in deed, without he shew the condition of record, or in writing sealed; yet the jury may help a man where the judges will take their verdict at large; of chattels he may.

[79] Promise doth make a condition, but when it doth depend upon another sentence, or hath reference to another part of the deed, it maketh no condition, but a qualification or limitation of the sentence, or of that part of the deed, as provided that the person of the grantee shall not be charged.

He which hath interest in a condition may fulfil the same for safeguard of himself.

Between the parties it is not requisite the condition

condition be performed in every thing if the other do agree; but to a stranger it must.

If the obligee be party to any act by which the condition cannot be performed, then the obligor shall be discharged; so he shall be by the act of the condition.

Where the first act in the condition is to be performed by the obligee, and he will not do it, there the obligation is not forfeited.

Where no time is set, if the condition be for the good of a stranger, or of the obligee, then it is to be performed within convenient time, if for the good of the obligor at any time during their lives; immediately shall not have such a strict construction, but that it shall suffice if it be done in convenient time.

If a man be bound to pay money, or farm rent, he must seek the parties: but if he be bound to perform all payment, if he render his farm on the land it sufficeth.

If the feoffee or feoffor die before the day of payment, the tender shall be to the executor, although the heir of the feoffee do enter, if the heir be not named. See *Assignee in Assignment*. [80]

The money must be tendered so long before sun-set, that the receiver may see to tell it.

To pay part of the sum at the day cannot be satisfaction for the whole sum; as a horse or a robe is. But before the day, or at another place, at the day of the request, and acceptance of the obligee, is full satisfaction.

An acquittance is a good bar if nothing be paid. (1)

In all cases of conditions a payment of a cer-

(1) And it is said that no proof to the contrary will be admitted. *Co. Lit.* 373. a.

tain sum in gross, touching lands or tenements, if lawful tender be once refused, he which made the tender is discharged for ever.

And the manner of the tender and payment shall be directed by him that made it, and not by him that did accept it, as that he paid the sum in full satisfaction, and that he accepted thereof in full satisfaction.

[81] Where a man is bound to pay money to make a feoffment, or renounce an office, or the like, and no time is limited when he shall do it, then upon request he is bound to perform it in so short a time as he may.

But where the time is limited, if he do refuse before the day it is no matter, if he be ready to perform it at the day.

Where a covenant or condition is to marry or enfeoff a stranger by such a day, the refusal of the stranger is no plea, as that of the obligee is. The obligee is to be ready on the land at his own peril; a stranger must be requested; if he refuse, the obligation is forfeited; wherefore it is good to have these words, *If the stranger do thereunto assent.*

For the doctrine of conditions, vid. Co. Lit. 13th ed. 201. a. n. 1. 203. b. Shep. T. c. 6. Lil. Conv. 25. 381.

E N T R Y .

The determination of an estate is not effected before entry.

When any person will enter for a condition broken, he must be seised on the same course and manner he was when he departed from his possession. (1)

(1) Vid. Co. Lit. 202. a.

C O N D I T I O N. 101

It behoveth such persons as will re-enter upon their tenants to make a demand of the rent.

If the lessor demand before he die, his heir may enter.

If the lessor distrain he may not re-enter.

The lessor may accept of the rent, and yet re-enter: but if he receive the next rent, he may not, for that establissheth the lease. [82]

Entry into one acre in the name of more is good: it doth not extend into two counties.

By the entry of the husband the franktencement shall be in the wife: and so of such like.

In gavilkind land the eldest son only shall enter for the breach of a condition.

See more concerning entry, Co. Lit. 240. b. Lil. Conv. 131.

D E M A N D.

The land is the place where the rent is to be paid and demanded, if there be no other place appointed.

And there the lessor himself, or his sufficient attorney, a little before sun-set, in the presence of two or three sufficient witnesses shall say, Here I demand of *J. B.* ten pounds due to me at the feast of, &c. for a messuage, &c. which he holdeth of me in lease by indenture, &c. and there remain the last day the rent is due to be paid, until it be so dark that he cannot see to tell the money.

W A R R A N T I E S. (1)

TH E R E are three manners of warranties, lineal, collateral, by descent.

Warranty lineal is where a man by his deed bindeth him and his heirs to warranty, and dieth, and the warranty doth descend to his issue. (2)

Warranty collateral is in another line, so that he to whom it descendeth cannot convey the title that he hath in the testaments by him that made warranty.

Warranty by disseisin is where he which hath no right to enter entereth, and maketh a warranty; this is by disseisin, and barreth not.

Lineal warranty barreth him that claimeth fee, and also fee-tail with assents in fee: if he sell, his son may have a *formedon*.

Collateral warranty is a bar to both, except in some cases that be remedied by statute, as warranty by tenement, by the curtesy, except he hath enough by descent by the same tenement.

(1) Warranties are now almost entirely superseded in practice by *covenants*, which, in their usual form, binding the *heirs*, *executors*, and *administrators* of the covenantor (as far as assents extend) are a better security than any warranty. Vid. 2 Bl Com. 304.

(2) But the warranty of the predecessor does not bind the successor. 2 Inst. 155.

Tenant in dower for life, not remedied, but [84]
do bar the heir and him in reversion.

A warranty descendeth always to the heir at the common law, *viz.* the eldest son, and followeth the estate, and if the estate may be defeated, the warranty may also.

It barreth not the second son in gavilkind, although all the sons shall be vouched, and not the eldest son alone; yet he only shall be barred. To plead a warranty against him that made it or his heirs, is called a Rebutter.

Where fee or franktenement is warranted, the party shall have no advantage if he be not tenant.

Where a lease for years is warranted, it shall be taken by way of covenant, and good if he be outed.

The feoffor by the words of *dedi & concessi* shall be bound to warranty during his own life.

See the history and an outline of the doctrine of warranty, Co. Lit. 13th ed. 365. a. n. 1. also Shep. T. c. 8.

CHAP. XLI.

[85]

COVENANTS.

COvenants are of two sorts, expressed by words in the deed, or implied by the law. A covenant in deed is an agreement made by the deed in writing between two persons, to perform some things and sealed; for no writ of covenant is maintainable without such a specialty but in *London, &c.*

When a covenant doth extend to a thing in being, parcel of the demise, or thing to be done

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by

by force of the covenant is *quodammodo* annexed, or appertaining to the thing demised, and goeth with the land, it shall bind the assignee if he be not named: as to repair the houses, it shall bind all that shall come to the same by the act of the law, or by the act of the party. (1)

But if the covenant do concern the land, or thing demised in some sort, the assignee shall not in all cases be charged although he be named; as to make a wall at another body's house, or to pay a sum of money to the lessor or to a stranger; but the lessee, his executors and administrators shall be charged.

[86] If the covenant do extend to a thing that had no being, but to be made new upon the land, it should bind the assignee, if he be named, because he shall have the benefit of it.

If a man make a lease for years, and the lessee covenanteth and granteth to pay, &c. to the lessor, his heirs and assigns, yearly during, &c. ten pounds, his executors shall have it.

A covenant in law upon a demise or grant, the assignee in deed or in law may have a writ of covenant.

An obligation to perform all covenants and grants is forfeit on the breach of a covenant in law.

A covenant in law is not broken but by an elder title.

A covenant in law may be qualified by the mutual consent of the parties.

Concerning the law of covenants in general and

(1) So in covenants concerning the inheritance the heir shall have action of covenant for breach, though he be not named. 2 Lev. 92.

of the usual covenants in modern assurances, vid. Lil. Conv. 49. 386. Shep. T. c. 7. Gilb. Covenants passim.

C H A P. XLII.

HOW CHATTELS PERSONAL may be bargained, sold, exchanged, lent, and restored.

A Contract is properly where a man for his money shall have by the assent of another, certain goods, or some other profit at the time of the contract, or after.

In all bargains, sales, contracts, promises, and agreements, there must be *quid pro quo* presently, except day be given expressly for the payment, or else it is nothing but communication. (1) [87]

If a man do agree for a price of wares, he may not carry them away before he hath paid for them, if he have not day expressly given him to pay for them.

But the merchant shall retain the wares until he be paid for them; and if the other take them, the merchant may have an action of trespass, or an action of debt, for the money, at his choice.

If the bargain be, that you shall give me ten pounds for my horse, and you do give me one-

(1) By stat. 29 Car. 2. c. 3. no contract for the sale of goods to the value of 10 l. shall be good without payment or delivery of a part, or unless the agreement be put in writing and signed by the party to be charged with the contract—and *vid. Trea. Eq. Forb. id. 326.*

penny in earnest, which I do accept, this is a perfect bargain, (2) you shall have the horse by an action of the case, and I shall have the money by an action of debt.

If I say the price of a cow is four pounds, and you say you will give me four pounds, and do not pay me presently, you may not have her afterwards except I will, for it is no contract. But if you go presently to telling of your money, if I sell her to another, you shall have your action of the case against me.

[88] If I buy an hundred loads of wood to be taken in such a wood at the appointment of the vendor; if he upon request will not assign them unto me, I may take them, or I may sell them: but if a stranger do cut down any part of the trees, I may not take them; but I may supply my grantee of the residue, or have my action of the case.

If the bargain be, that I shall give you ten pounds for such a wood, if I like it upon the view thereof, this is a bargain at my pleasure upon my view: and if the day be agreed upon, if I disagree before the day, if I agree at the day, the bargain is perfect, although afterwards I do disagree. But I may not cut the wood before I have paid for it; if I do, an action of trespass will lie against me; and if you sell it to another, an action of trespass on the case will lie against you.

If I sell my horse for money, I may keep him until I am paid; but I cannot have an action of debt until he be delivered, yet the property of

(2) By the earnest the bargain is not *absolutely* bound—for if the goods be not taken away in a reasonable time the agreement is vacated. 1 *Salk.* 113.

the horse is by the bargain in the bargainor or buyer: but if he do presently tender me my money, and I do refuse it, he may take the horse, or have an action of detainment. And if the horse die in my stable between the bargain and the delivery, I may have an action of debt for my money, because by the bargain the property was in the buyer. [89]

If a deed be made of goods and chattels, and delivered to the use of the donee, the property of the goods and chattels are in the donee presently. Before any entry or agreement, the donee may refuse them, if he will.

If I take a horse of another man's and sell him, and the owner take him again, I may have an action of debt for the money; for the bargain was perfect by the delivery of the horse, (1) & *caveat emptor*. Every contract importeth in itself an assumption: for when one doth agree to pay money, or deliver a thing upon consideration, he doth, as it were, assume and promise to pay and deliver the same; and therefore, when one selleth any goods to another, and agreeth to deliver them at a day to come, and the other in consideration thereof, agreeth to pay so much money on the delivery, or after, in this case, he may have an action of debt, or an action on the case, upon the assumption.

The duty to resign an action personal may not be apportioned: as if I sell my horse, and another man's for ten pounds who taketh his horse again, I shall have all the money.

If a man retained a servant for ten pounds *per annum*, and he depart within the year, he [90]

(1) The sale must in this case be made in *market overt*, 2 Inst. 719.

can have no wages : if it were to be paid at two feasts, and the man after the first feast die, he shall have wages but for the first feast : therefore men take order for it in their wills.

By a contract made in a fair or market, the property is altered, except it be to the king, so that the buyer know not of the former property, and do pay toll, and enter it ; and those things as thereupon ought to be done, it must be on the market, and at the place where such things are usually sold ; as plate at the Goldsmith's stall, and not in his inner shop.

In exchange of a horse for a horse, or such like, the bargain is good without giving of day or delivery.

[91] If a thing be promised by way of recompence for a thing that is past, it is rather an accord than a contract ; and upon an accord there lieh no account, but he unto whom the promise is made, may have charge by reason of the promise, which he hath also performed ; then he shall have an account for the thing promised, though he that made the promise hath no profit thereby : as if a man say to another man, Heal

such a poor man, or make such a highway, &c. The intent of the party shall be taken according to the law : as if a man retain a servant, and do not say one year, or how long he shall serve him, it shall be taken for one year, according to the statute.

In all contracts, he that speaketh obscurely or ambiguously, is said to speak at his own peril ; and such speeches are to be taken strongly against himself.

For more learning on the law of contracts, as well as to personal, as real property, vid. 2 Bl. Com.

Com. 384. 389. 440. 1 Pow. Cont. *passim*. 1
Trea. Eq. Forb. ed. 197. 380.

C H A P. XLIII.

OF LENDING AND RESTORING.

IF money, corn, wine, or such other things, which cannot be re-delivered, be occupied or borrowed, if it perish, it is at the peril of the borrower.

But if a horse, or a cart, or such other things, as may be used and delivered again, be used in such manner as they were lent, if they perish, he that owneth them shall bear the loss, if they perish not through the default of him that did borrow them, or that he did make a promise at the time of delivery to re-deliver them safe again. If they be occupied in any other wise than according to the lending, in what wise soever it perish; if it be not in default of the owner, he that did borrow them shall be charged with them in law and conscience.

[92]

If a man have goods to keep a certain day, he shall be charged or not charged after as default or defaults are in him.

But if he have any thing for keeping them safe, or make promise to re-deliver them, he shall be charged with all chances that may fall, because of his promise.

If a man find goods of another man's, if they be hurt or lost by the negligence of him that found them, he shall be charged to the owner.

*

If

If a common carrier go by ways that be dangerous for robbing, and will drive by night, or other unfit times, and is robbed; or if he do over-charge his horse, or driveth so that his stuff fall into the water, or otherwise be hurt by his default, he shall be charged by his default. (1)

And if a carrier would *per case*, refuse to carry, unless a promise were to him, that he shall not be charged with any such misdemeanor, that promise were void.

Every innholder is bound by the law *bona & catalla* of his guest to keep in safety, so long as it is within the inn, if the guest did not deliver them unto him, nor acquaint him with them.

[93] He shall not be charged if the servant or companion of the guest do imbezil them; or if the guest do leave them in the outward court.

The horser shall not answer for the horse that is put to pasture at the request of the guest; but if he do it of his own head he shall.

If any man offer to take away my goods, I may lay my hands upon him, and rather beat him than suffer him to take or carry them away.

C H A P. XLIV.

How far other Men's CONTRACTS and MISDEMEANORS do bind us.

A Man shall be bound by many trespasses of his wife, but not to sustain corporal punishment for it.

(1) A carrier is answerable if the goods be damaged, whether by his default or not, unless it be by the act of God, as by lightning, &c. 1 *Str.* 128.

For

For murder, felony, battery, trespass, borrowing or receiving of money in his master's name by a servant, the master shall not be charged, unless it be done by his command, or came to his use by his assent.

If I command one to do a trespass, I shall be a trespasser, (1) or otherwise if I do but consent. There is no accessory in trespass.

We shall be charged if any of our family lay or cast any thing into the highway, to the nuisance of his Majesty's liege people. [94]

Every man is bound to make recompence for such hurt as his beasts shall do in the corn or grafs of his neighbour, though he knew not that they were there; and for his dogs, bears, &c. if they hurt the goods or chattels of any other, for that he is to govern them.

A man shall not be charged by the contract of his wife, or his servant, if the thing come to his use, having no notice of it. But if he command them to buy, he shall be charged though they come not to his use, or had notice thereof.

If a wife or servant use to buy or sell, if he sell his master's horse, and exchange his ox for wheat that cometh to his master's use, his master may not have an action of trespass for it; but he shall be charged for the corn, and the other need not to shew that he had warrant to buy for him.

If a man servant that keepeth his shop, or that useth to sell for him, shall give away his goods, he shall have trespass againit the donee.

(1) This must be understood to extend only to servants and others over whom I may have a lawful authority; and in the case of a servant he is not excused. 1 Bl. Com. 429.

[95] But if I deliver my goods to another to keep to my use, and he do give them away, I shall not; for the donee had not notice whose goods they were, as in the case of the servant.

If a man make another his general receiver, which receiveth money, and maketh an acquittance, and payeth not his master, yet that payment dischargeth the debtor.

If a servant keep his master's fire negligently, an action lieth against the master. (1) Otherwise, if he bear it negligently in the street.

If I command my servant to distrain, and he doth ride on the distress, he shall be punished, not I.

If a man command his servant to sell a thing that is defective, generally to whom he can sell it, deceit lieth not against him: otherwise if he bid him sell it to such a man, it doth.

A contract or a promise made to the wife is good, when the husband doth agree; so it is to a servant; and it shall be said to be made to the husband and master himself.

If a man taketh a wife that is in debt, he shall be charged with her debts during her life; if she die, he shall be discharged. (2)

See more concerning the law of contracts, 1 Bl. Com. 428. 433. 2d ibid. 443. 1 Pow. Cont. pass.

(1) The law in this respect has been since altered by stat. 6 Anne, c. 3. which enacts that an action shall not lay against any one in whose house or chamber a fire shall accidentally begin. If it happen through the carelessness of a servant he shall forfeit 100 l. or suffer imprisonment.

(2) Except as to so much of her property as he did not reduce into possession during her life, for which he is answerable as administrator of his wife. 1 P. Wil. 468.

C H A P. XLV.

[96]

WILLS AND TESTAMENTS.

HAVING hitherto treated of such contracts as do take effect in the life-time of the parties, with their differences, it is now to deal with instruments which take effect after their deaths, that those things which they have preserved with care, and gotten with pains in their life, might be left to their posterity in peace and quietness after their death: of which sort are last wills and testaments.

There are two sorts of WILLS, Written and Nuncupative.

A nuncupative testament is when the testator doth by word only, without writing, declare his will before a sufficient number of his chattels only; for lands pass not but by writing. It may for the better continuance after the making be put in writing, and proved; but it is still a testament nuncupative. (1)

A written testament is that, which at the very time of the making thereof is put in writing, by which kind of testament in writing only lands and tenements pass, and not by word of mouth only.

[97]

Two things are required to the perfection of a will by which lands pass, viz. first, writing,

(1) By stat. 4 and 5 *Anne*, c. 16. nuncupative wills must be put into writing within six days after the making—other regulations are also made respecting these wills by the same stat. and also by 29 *Car.* 2. c. 3. s. 19.

which

which is the beginning; secondly, the death of the deviser, which is the finishing. (2)

In a will of goods there must be an executor named; otherwise of lands.

A man may make one executor or more simply, or conditionally for a time, or for parcel of his chattels.

If no executor be named, then it still retaineth the name of a last will, and shall be annexed to the letters of administration in regard of the gift.

Gavilkind lands may be devised by custom.

Lands holden in socage tenure are all devisable in writing, but knights service two parts in three. (3)

Fear, fraud, and flattery, three unfit accidents to be at the making of a will.

A woman may make a will of the goods of her husband by his consent and licence: by word is sufficient, and of the goods she hath as executor without his consent; but she cannot give them unto him.

[98] A boy after his age of fourteen, and a maid after her age of twelve, may make a will of their goods and chattels by the civil law. (4)

The will of the donor shall be always observed, if it be not impossible, or greatly contrary to the law.

A deviser is intended *inops consilii*, and the

(2) It is further necessary (by *f. 4* of the last-mentioned act) that it be subscribed by the testator in the presence of three or four credible witnesses.

(3) Since stat. 12. C. 2. c. 24. converting the military into socage tenures, all lands are devisable at the pleasure of the owner.

(4) And so too by the common law. *Vid. Co. Lit. 13th ed. 89. b. n. 6.*

law shall be his counsel; and according to his intent appearing in his will, shall supply the defect of his words.

A prerogative will is five pounds in another diocese.

A man may not traverse the probate of a testament, or letters of administration directly, but he may say against the testament, that the testator never made the party his executor.

See further as to the doctrine of wills, 2 BL. Com. 503. Lil. Conv. 473. Shep. T. c. 23. Wood Inst. 308.

C H A P. XLVI.

D E V I S E S.

A Devise ought to be good and effectual at the time of the death of the devisor.

The devisee may not enter into the term, or take a chattel, but by the delivery of the executor.

But he may sue for it in court christian.

Into franktenement or inheritance he may enter. [99]

Devisees are purchasees: as if a lease for years be willed to a man and his heirs, the heir shall have it; for heir is a name of purchase here.

A reversion of lands or tenements will pass by the name of lands and tenements in a devise.

If a man devise all his lands and tenements, a lease for years doth not pass where he hath lands in fee; and also a lease there, otherwise it will.

If

If a man devise all his *goods*, a rent-charge which he had for years will pass, and all other his personal chattels. (1)

And if a man give all his moveables to one, he shall have all his horses, cattle, pans, and personal chattels; and all his immoveables to another, he shall have all his corn growing, and fruit on his trees, and the chattels real.

A man may devise lands or goods to an infant in the mother's belly, or goods to the churchwardens of *D.*

[100] There is great diversity where the property is devised; and when the occupation is devised a man may devise, that a man shall have the occupation of his plate, or other chattels during his life, or for years, and if he die within the term, that it shall remain to *M. A.* and it is good; for the first hath but the occupation, and the other after him shall have the property.

But if a chattel be given to one for life, the remainder to another, the remainder is void. (2)

For a grant or devise of a chattel for an hour is good for ever, and the devisee may dispose of it; but if he do not, the other shall have it.

A man may devise his lands he holdeth in lease, but not his lease under this condition; provided that if the devisee die within the term, then he shall have it.

If a man will his goods to his wife, and that after her decease his son and heir shall have the house wherein they are; she shall have the house for term of her life, yet it is not devised unto her by express words. But it doth appear, that his intent was so by the words.

(1) *Viz.* If it appear from the context of the will, that the testator intended to comprize them.

(2) *Vid supra* chap. 12. n. 2.

If a man willeth his lands to his wife till his son cometh to the age of twenty-one years, and the woman taketh another husband and dieth, the husband shall have the interest.

By a devise, a man may have the fee-simple without exprefs words of heirs: as if lands be willed to a man for ever, or to have and to hold to him and to his assigns, &c. [101]

By will, lands may be entailed without the word Body: as if lands be given to a man and his heirs male, it doth make an estate tail.

If a man will that his executors shall sell his lands, the inheritance doth descend to the heir; yet the executors may enter and enfeof the vendee.

But if lands be given to the executor to sell, and they receive the profits thereof to their own use, and do not sell the same in reasonable time, the heir may enter.

An executor may sell if the others will not.

If lands be recovered against tenant for life, or for years, by an action of waste or former title, he may not give his corn.

If the cognisee have sown the lands, and the cognisor bring a *scire*, he may give the corn sown.

If a man devise *omnia bona & catalla*, hawks nor hounds do not pass, nor the deer in the park, nor the fish in the ponds.

Vid. more learning respecting wills, 2 Bl. Com. 380. Co. Litt. 111. 176. b. Lil. Con. 102. 473. Wood In. 282. Shep. T. c. 23. Gilb. Dev. Pow. ditto *pass*.

[102]

CHAP. XLVII.

[101]

EXECUTORS.

AN executor is he that is named and appointed by the testator to be his successor in his stead to enter, and to have his goods and chattels, to use actions against his debtors, and legacies so far as his goods and chattels will extend.

Where two executors are made, and one doth prove the will, and the other doth refuse, notwithstanding he that refuseth may administer at his pleasure, and the other must name him in every action for every duty due to the testator, and his release shall be a good bar. If he do survive he may administer, and not the executor of him that died: but otherwise if all had refused.

If one prove the will in the name of both, he that doth not administer shall not be charged.

If the executor do once any action that is proper to an executor, as to receive the testator's debts, or to give acquittance for the same, &c. he may not refuse.

[103] But other acts of charity or humanity he may do, as to dispose of the testator's goods about the funeral, to feed his cattle lest they perish, or to keep his goods lest they be stolen: these things may every one do without danger.

When executors do bring an action, it shall be in all their names, as well of them that do refuse as of others.

But an action must be brought against him that doth administer only; and he which first cometh shall first answer.

An executor of an executor is executor to the first testator, and shall have an action of debt, account, &c. or of trespass, as of the goods of the first testator carried away, and execution of statutes and recognizances, &c. 25 Ed. 5.

The title and interest of an executor is by the testament, and not by the probate, but without shewing it they may release the probate.

The justices will not allow them to sue actions. (1)

The executor shall have the wardship of the body and lands of the ward in knights service, but not in socage and leases for years, and rent-charges for years, statutes, recognizances, bonds, lands in execution, corn upon the ground, gold, silver, plate, jewels, money, debts, cattle, and all other goods and chattels of the testator, if they be not devised, and may devise them: but if he do will *omnia bona & catalla sua*, the goods of the testator pass not, neither shall they be forfeited by the executor.

[104]

An executor is chargeable for all duties of the testator that are certain, but not for trespass, nor for receipt for rents, nor for occupation of lands, as bailiff or guardian in socage, &c. for this is not any duty certain so far as he shall have assets. If the executor do waste the goods of the testator, he shall pay them of his own.

An executor shall not be charged but with such goods as come to his hands; but if a stranger take them out of his possession, they are assets in his hands.

If an executor take goods of another man's amongst the goods of the testator, he shall be excused of the taking in trespass.

(1) They may commence actions, but the defendant need not plead till the probate is produced. *Went. c. 3.*

120 ADMINISTRATORS.

Duties by matter of record shall be satisfied before duties by specialty; and duties by specialty before charges; and legacies before other duties. (1)

An executor may pay a debt or credit of some kind, depending the writ, before notice of the action, but not after notice or issue joined.

[105] An executor may pay debts with his own money, and retain so much of the testator's goods, but not lands appointed to be sold.

Any of these words, *debere, solvere, recipere*, borrowed, or any word that will prove a man a debtor, or to have the money, if it be by bill, will charge the executor or administrator, but not the heir if he be not named.

See more concerning executors, Wood Inst. 310. 2 Bl. Com. 504. Co. Litt. 239. b. 264. b. Went. Ex. c. 12.

C H A P. XLVIII.

ADMINISTRATORS.

AN administrator is he to whom the ordinary of the place, where the intestate dwelt, committeth the testator's goods, chattels, credits, rights.

For wheresoever a man dieth intestate, either for that he was so negligent he made no testament, or made such an executor as refused to

(1) *Debts of every kind, as well by simple contract as by record and specialty, must be paid before legacies. Went. c. 12. and by several statutes, certain other duties are preferred to these, vid. 30 Car. 2. c. 3. 9 Anne, c. 10. 17 Geo. 2. c. 38.*

prove

prove it, or otherwise is of no force; the ordinary may commit the administration of his goods to the widow, or next of kin, or to both, which he pleaseth, making request, and revoke it again at his pleasure.

The ordinary may assign also a tutor to the intestate's children, to his sons until twelve years.

But so that it may be not a prejudice to him that is the guardian: and after those years he or she may respectively chuse their own curators, and the guardian may confirm them, if there be no good order taken by their father's will. [106]

As if such a tutor die, the infant cannot have an action of account against his executor.

The power and charge of an administrator is equal in every point to the power and charge of an executor. (1) A man may have an action of the case against the executor or administrator upon the assumption of the testator, upon good consideration, or debt for labourers wages, by the statute.

And if a man make an infant his executor, the ordinary may commit the execution of the will to the tutor of the child to the child's behoof, until he be of the age of seventeen years, and if it be granted for longer time it is void.

An administrator *durante minoritate* may do nothing to the prejudice of the infant, he may not sell any of the goods of the deceased, unless it be upon necessity; as for the payment of debts,

(1) The power and duty of an administrator are by statute 31 Ed. 3. c. 11. rendered nearly the same as those of executors, but they still differ in some respects; as if there be several administrators, one of them cannot release debts or sell goods without the others joining, as an executor may. 1 Atk. 460.

or that they would perish; nor let a lease for a longer time than whilst he is executor.

[107] An infant upon the true payment of a debt due to the testator may make an acquittance, and it shall be good.

For a child may better his estate, but not make it worse.

C H A P. XLIX.

H E I R.

IF a man die seised of any lands, and do not dispose of them by his will, they descend to his heir, as aforesaid.

And he shall have not only the glasse and wainscot, but any other of such like things affixed to the freehold or ground, as tables dormant, furnaces, vats in the brewhouse or dyehouse, and the box or chest wherein the evidences are, the hawks and the hounds, the doves in the dovehouse, the fish in the pond, and the deer in the park, and such like.

He shall be charged by specialty for the debts of his ancestor, so long as he hath assets, if the executor or administrator have not sufficient.

No law nor statute doth charge the heir for the wrong or trespass of his father, but by express words.

[108]

W I D O W.

The widow shall have all her apparel, her bed, her copher, her chains, borders, and jewels, by the honourable custom of the realm, except her husband unkindly give any of them away.
Or

Or be it in debt, that it cannot be paid without her bed, &c. yet she shall have her necessary apparel.

CHAP. L.

ARBITRAMENT.

What things are ARBITRABLE, and what not.

THINGS and actions personal incertain are arbitrable; as trespass, taking away of a ward, &c. (1)

But things certain are not arbitrable, but when the submission is by specialty, if they be not joined with others incertain; as debt with trespass.

Matters concerning the commonwealth, some are not arbitrable; as criminal offences, felonies, and such like, concerning the crime.

In the submission, three things are to be regarded:

First, That it be made in writing with the parties covenants, or bonds subsequent and sufficient to bind them, their heirs, executors, and assigns to perform the award which shall be thereupon made, that both the arbitrators may know their power, and the parties revoke not

[109]

(1) By 9 and 10 *Wil. 3. c. 15. s. 1.* merchants and others desiring to end any controversy (for which there is no other remedy than a personal action, or suit in equity) by arbitration, may agree that their submission shall be made a rule of court; and the same shall be made a rule accordingly; and the parties shall submit to and finally be concluded by such arbitrament.

their power; for all is void that is not contained in the submission, or necessarily depending thereupon; and the arbitrator's labour is lost, if they want means to compel the same to be executed.

Secondly, That there be power given to them sufficient to do all things necessary for the ordering of the controversies; as to appoint times and places for their meetings, to examine and decide the matters committed, and to bring their parties with their proofs, evidences, and witnesses, thither together before them, and to punish the place defective, and to expound and correct such doubtful sentences and questions, as may arise upon their award, afterwards inconvenient to either parties, contrary to equity and the arbitrator's good meaning; which inconveniencies were not before by them seen at the making of the award. *Temporis filia veritas.*

Thirdly, Convenient time and place are to be limited for the yielding up their award to the parties, or to their assigns.

[110]. Six things to be regarded in an Arbitrament.

1. That it be made according to the very submission touching the things committed, and every other circumstance.
2. That it be a final end of all controversies committed.
3. That it appoint either party to give or do unto the other something beneficial, in appearance at least.
4. That the performance be honest and possible.
5. That there be a mean how either part by the

the law may attain unto that which is thereby awarded unto him.

6. That every party have a part of the award delivered unto him.

For if it fail in any of these points, then is the whole arbitrament void, and of none effect.

Examples thereof.

1. An award that the parties shall obey the arbitrament of *A. M.* is void, for power may not be assigned.

An award that any of the parties shall be bound or do any other act by the advice of the arbitrator, is not good, except it be in the submission so; but that the parties shall be bound, or make assurance by the advice of counsel, is good. [111]

2. An award that the parties shall be nonsuited, is not good; because it is no final end, for the party may begin again: that the party do withdraw his suit, is good.

If the submission be of divers things, and the award only of some of them, yet is the award good for that part; as if the submission be of all actions real and personal only, or if it be only *de possessione*.

3. If to submit themselves to the arbitrament of all trespasses, and it is awarded that the one shall make amends to the other, and nothing is awarded for the other's benefit; this award is void.

So it were if one of them should go quite against the other, if the submission were not by bond; for an award must be final, obligatory, and satisfactory, to both parties.

An award, that either party shall release to the

other all actions, and that because the one hath trespassed more than the other, he shall pay to the first, is good.

In debt or trespass of goods taken, that the defendant shall retain part, and the plaintiff to have the rest, is not good.

[112] 4. An award that one of the parties shall do an act to any stranger, the act is void, if the parties be not bound.

Or if it be that he shall cause a stranger to enfeoff, or be bound to the other party, because he hath no means to compel the stranger.

5. An award is void if it be neither executed, nor any means by law for the execution thereof: as if it should be awarded, that one should pay the other ten pounds, this is good; for he may recover the same by an action of debt. But if it were awarded, the one should deliver to the other an acre of land, or do such like act executory, it were void if it be not delivered strait way, or provision made by bond or otherwise, to compel the payment thereof according to the award, if the submission be not by specialty.

6. Indentures of arbitrament must be made of so many parts, that every person may have a part.

Arbitramentum æquum tribuit cuique suum.

[113] An award is commonly made by laymen, and shall be taken according to their intent, and not in so precise a form as grants or pleadings, but as verdicts; yet the substance of the matter ought to appear either by express words, or by words equivalent, or by those that do amount thereunto.

But it were good, that awards were drawn up
by

by some that is skilful, for the avoiding of controversies, which otherwise may arise about the same.

An agreement is made between the parties themselves : there must be a satisfaction made to either party presently, or remedy for the recompence, or else it is but an endeavour to agree. (1)

Tender of money without payment, or agreement to pay money at a day to come, is not any satisfaction before the day be come, and the money be paid. It cannot be pleaded in bar in an action of trespass; for that as the other party hath no means to compel the other to pay the money, so he may refuse it at the day if he will. Otherwise in an arbitrament : but money paid at a day, before the action is brought, is a good plea.

(1) By 29 Car. 2. c. 3. every agreement not to be performed within a year must be in writing, and signed by the parties; and *vid. sup. chap. 42. n. 1.*

A

TREATISE

OF

PARTICULAR ESTATES.

By Sir JOHN DODERIDGE, Knt.

OF PARTICULAR ESTATES.

A Particular estate is such as is derived from a general estate, by separation of one from the other: as if a man seised in fee-simple of lands or tenements, doth thereof creat by gift or grant an estate-tail, or by demise, a lease for life, or any estate for years, these are in the donee or lessee. Particular estates in possession derived and separated from the fee-simple in the de-donor or lessor in reversion.

Also if lands be demised to *A.* for life, the remainder to *B.* and the heirs of his body, the remainder to *C.* and his heirs, the estate for life limited to *A.* the estate tail limited to *B.* are particular estates derived *ut supra*, and separated in interest from the fee-simple: the remainder
given

given to C. albeit the same remainder doth depend upon those particular estates.

And of particular estates some are created by agreement between the parties, as the particular estates before specified: and some by act of law, as the estate in tail *apres possibility de issue extinct*, estates by the curtesy of *England*, dower and wardship: For albeit an estate in dower be not complete until it be assigned, which oftentimes is done by assent and agreement between parties; yet because the party that so assigneth the same is compellable so to do by course of law, that estate also is said to be created by law. Also an estate at will is a kind of a particular estate, but yet not such as maketh any division of the estate of which the lessor is seised; for notwithstanding such an estate, the lessor is seised of the land in his demesne as of fee in possession, and not in reversion.

Also an estate at will is not such particular estate whereupon a remainder may depend. But of all the estates before mentioned, many fruitful rules and observations are both generally and particularly so lively set forth by Mr. LITTLETON, in the first, second, third, fourth, fifth, sixth, seventh and eighth chapters of his first book, which is extant as well in *English* as in *French*, whereunto I refer you.

[119]

P O S S E S S I O N.

IT is further to be observed, that all estates that have their being are in possession, reversion, remainder, or in right; but of all these possession is the principal. There are two de-

grees of the first and chiefest possession, *in fait poss'*, in law or deed, is such as is before spoken of; and that is most proper to an estate which is present and immediate: but yet such possession of the immediate estate, if it be not greater than a term, doth operate and enure to make the like possession of the freehold or reversion. When a man is said to have a term, it is to be intended for years: when it is said, a man to have the fee of lands, it is also to be intended a fee-simple. Possession is that possession which the law it self

[120] casteth upon a man before any entry or pernamcy of the profits: as if there be father and son, and the father dieth seised of lands in fee, and the same to descend to the son as his next heir; in this case, before any entry the same hath a possession in law. So it is also of a reversion expectant, or a remainder dependant upon particular estate or life: in which case, if tenant for life die, he in reversion or remainder, before his entry, hath only possession in law. All manner of possessions that are not possessions *in fait*, are only possessions in law: and it is to be observed then, if a man have a greater estate in lands than for years, the proper phrase of speech is, that he is thereof seised: but if it be for years only, then he is thereof possessed. But yet nevertheless the substantive *Possession* is proper as well to the one as to the other.

REVERSION.

[121] **A** Reversion is properly an estate which the law reserveth to the donor, grantor, or lessor, or such like, which he doth dispose parcel of

of his estate, when he doth dispose less estate in law, than that whereof he was seised at the time of such disposition: as if a man seised of lands in fee, doth give the same to another, and the heirs of his body; or if he doth dismiss the same for life or years; in these cases, the same reserveth the reversion thereof in fee to the donor or lessor, and his heirs, because he departed not with his whole estate, but only with a particular estate, which is less than his estate in fee: and such reversion is said to be expectance upon the particular estate. Also if he that is but tenant for life for land, and doth by deed or parol give the same to *S.* in tail, or for term of his life, which is a greater estate than he may lawfully dispose: in this case, the law reserveth a reversion in fee in such donor, though he were formerly but tenant for life. And the reason thereof is, for that by such unlawful disposition, which by deed or word cannot be without livery and seisin, he doth by wrong pluck out the rightful estate in fee, from him that was thereof formerly seised in reversion or remainder, and thereof by a priority of time, gained in an instant, he was seised of a fee-simple at the time of the execution thereof. But if a man seised of lands in fee-simple, giveth the same to *A.* and his heirs, until *B.* do die without heir of his body; in this case the law reserveth no reversion in the donor, because the estate disposed to *A.* is a fee-simple determinable, is in nature so great as the estate which the donor had at the time of such gift, and consequently he departed thereby with all his estate, and thereby an apparent difference is between a gift made to *A.* and the heirs of his own body, and a gift made to him and his heirs until *B.* die without heir of his body; for in the one case, the donor hath but an estate tail; and in the other, a fee-simple determinable

[122]

hath a possibility of reverter : for if *B.* die without heir of his body, then whether *A.* be living or dead it shall revert to the donor by such possibility of reversion ; for he that hath but such a possibility hath no estate, nor hath he power to give his possibility : but in the other case, the donor hath his estate in fee ; and therefore he hath power to dispose thereof at his pleasure.

See references to Chap. XIII.

A Remainder is a remnant of an estate disposed of to another at the time of creation of such particular estates whereupon it doth depend : as if *S.* seised of lands in fee, demiseth the same to *B.* for life, the remainder to *C.* and the heirs of his body, the remainder to *D.* and his heirs : in this case, *S.* hath a particular estate of the lessor, it is then also disposed to *C.* and *D.* *ut supra*, whereby *B.* hath an estate for life, *C.* a remainder in tail, and *D.* a remainder in fee, depending in order upon the particular estate in possession. And in every remainder five things are requisite.

First, That it depend upon some particular estate.

Secondly, That it pass out of the grantor, donor, or lessor, at the time of the creation of the particular estate whereon it must depend.

Thirdly, That it vest during the particular estate, or at the instant time of the determination thereof.

Fourthly, That when a particular estate is created,

created, there be a remnant of an estate left to the donor, to be given by way of remainder.

Fifthly, That the person or body to whom the remainder is limited, be either capable at the time of limitation thereof, or else *in potentia propinqua*, to be thereof capable during the particular estate. If lands be given to *J. S.* and his heirs, the remainder for default of such heir to *J. D.* and his heirs, that remainder is void, because it doth not depend upon any particular estate. But if lands be given to *J. D.* for the life of *J. D.* the remainder to *J. B.* his remainder is good, for it is not limited to depend upon a fee-simple, but upon a particular estate; which is only called an estate for life of *J. B.* descendable. If lands be given to *B.* for eleven years, if *C.* do so long live, the remainder after the death of *C.* to *D.* in fee, this remainder is void; for in this case, it cannot pass out of the lessor at the time of the creation of the particular estate for years: but if a lease be made to *B.* for life, the remainder to the heirs of *C.* who is then living; this remainder is good, upon a contingency, that if *C.* die in the life of *B.* for that remainder may well pass out of the lessor presently without *abeyance*, without any inconveniency, because only the inheritance separated from the freehold is an *abeyance*. If lands be given for life, with a remainder to the right heirs of *J. S.* and the tenant for life dieth in the life of *J. S.* this remainder is void, because it did not vest or settle, either during the particular estate, or at the time of the determination thereof; for until *J. S.* die, no person is thereof capable by the name of the heir. [124]

But if lands be given to *J. S.* for term of his life, the remainder to his right heir, (in the singular [125]

singular number) and to the heirs of his body, and after *J. S.* hath issue a son, and dieth, that is a good remainder, and the son hath thereby an estate tail; for although it were impossible that such remainder should vest during the particular estate, because during his life none could be his heir, yet it may be and did vest at the instant of his death, which was at the time of his determination of the particular estate.

Concerning the fourth thing; if a man seised of lands in fee, granteth out of the same a rent, or common to pasture, or such like thing, which before the grant had no being, to *J. S.* for term of life, the remainder to *J. D.* in fee, this remainder is void; because of this thing granted, there was no remnant in the grant to dispose. And because some heretofore have been of opinion, that albeit
 [126] the same cannot take effect, as another grant of a new rent or common; *Ut res magis valeat quam pereat.*

This is a rule in law, That a thing enjoined in a superior degree, shall not pass under the name of a thing in any inferior degree. And therefore, if lands be given unto two persons, and unto the heirs of one of them; unto the husband and wife, and heir of the husband; and he that hath the estate of inheritance granteth the reversion of the same land to another in fee, such grant is void; because the grantor was thereof seised in a superior degree, viz. in possession, and not in reversion, as appeareth 22 *Ed. 4. fol. 2.* & 13 *Ed. 3. Brooke title Grants 137.*

And concerning the first and last thing, If a lease be made of land for term of life, the remainder to the Mayor and Commonalty of *D.* whereas there is no such corporation there in being,

being, this remainder is meerly void, albeit the King's Majesty by his Letters Patents do create such corporations during the particular estate; for at the time of such grant the remainder was void; because then there was no such body corporate thereof capable, or *potentiâ propinquâ* to be created and made capable thereof during the particular estate, but the possibility thereof was then foreign and not probably intended. The like law is, If a remainder be limited to *J.* the son of *T. S.* who had then no son, and afterwards, during the particular estate, a son is born who is named *J.* yet this remainder is void; for at the time of such a grant it was not to be probably intended, that *T. S.* should have any son of that name. [127]

Also before the dissolution of Abbies, if a lease of land were made to *J. S.* for life, the remainder to one that then was a Monk, such remainder was void for the cause before alledged, albeit we were dereigned during the particular estate. But if such remainder had been limited to the first begotten son of *J. S.* it had been good, and should accordingly have vested in such a son afterwards born during the particular estate.

See references to Chap. XII.

R I G H T S.

A Right in land is either clothed or naked: a right clothed is when it is wrapped in a possession, reversion, or remainder. A naked right, which is most commonly called a right, is when the same is separated from the possession or remainder by disseisin, discontinuance, or the de-vesting [128]

vesting and separating of the possession: as for example, If a lease of land be made for life to *J. S.* the remainder to *J. D.* in fee; in this case, *J. S.* hath a right clothed with a remainder. But if a stranger that hath no right or title, doth in the same case enter into the land by wrong, and put *J. S.* out of possession, such entry by wrong is called a Disseisin: and therefore the possession is moved from the right, by reason thereof, the disseisor is seised of the land, and *J. D.* hath also the like naked clothing to the remainder by such disseisin, is likewise divested and plucked out of him, cannot be re-vested in him during the right of such particular estate, unless the possession of such particular tenant be therewith re-vested, which must be by his entry or recovery by such action; and by such entry of the particular tenant, or by his recovery with execution, the remainder shall be invested as well as the particular estate. And so there is a right in goods and chattels, as well as lands, tenements, and hereditaments, which is also clothed with a possession, so long as the rightful proprietor hath the same; but if another doth take them from him by wrong, he now hath only a naked right to the same, which cannot be by him granted for the cause before alledged; but yet he may release his right there unto him that is thereof possessed, for the same reason that is before alledged. If a release of right happen to be forfeited to the King, his Highness may grant the same by his prerogative.

[129]

CERTAIN

CERTAIN
OBSERVATIONS
CONCERNING
A DEED OF FEOFFMENT.(1)

By T. H. Gent.

The PREMISES.

YOU may find in the premisses, first, the direct nomination as well of the feoffor as of the feoffee, together with their places of residence, habitation, or dwelling, and their qualities, estates, additions, or conditions. Secondly, The certain exprelment and setting down of the lands conveyed.

In Com. Norff.] Comitatus dicitur à comitando, of accompanying together; for generally, at assises and sessions, those of that county where such assises and sessions are kept, use to be impanelled upon juries, &c. for trial of issue taken upon the fact betwixt party and party, and not those in another county: and it is a common presumption, that all persons within their counties

[134]

(1) The form of an *old* deed of feoffment, with which these observations may be compared, the reader will find 2 *Blac. Com. Append. No. 1.* and a *more modern* one (well drawn) 1 *Bridg. Conv. p. 22.*

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take notice of such things as are there publicly done; hereupon it happeneth, that where lands, &c. lie in divers counties, if they be conveyed by feoffment, &c. livery of seisin must be made in every county, where any parcel of the lands, &c. do lie. Otherwise it is of two parcels of land in one and the same county. The name County is in understanding all one with Shire, which is so called from dividing, and either of them contain a certain portion of the realm, which is parted into counties or shires for the better government thereof, and the more easy administration of justice. Hence it cometh to pass, that there is no parcel of this kingdom which lieth not within the circuit or precinct of some county or shire. There are reckoned in *England* forty-one counties or shires, and in *Wales* twelve. The county of *Norfolk* lying northward is so called in opposition to *Suffolk*, which lieth towards the south, each one in respect of other gaineth his name.

[135] The addition given to the feoffor, you may perceive to be *Yeoman*; the etymology whereof Mr. *Verstegan* fetcheth from *Gemen*, a word anciently used amongst the *Teutonicks*, which (as my author saith) signifieth *Vulgar* or *Common*; and so the letter *G* by corruption being turned into the letter *Y*, we say and read *Yemen* or *Yeomen*. Others (how probably I dare not affirm) derive it by contraction from these two words, viz. *Young Men*. Famous Mr. *Camden* in his *Britannia*, after he hath reckoned up sundry degrees both of Nobility and Gentry, ranketh *Yeomen* in order next Gentlemen, naming them *Ingenuous*; in which sense I apprehend *Yeomen* to be mentioned in a certain statute made 16 R. 2. and in divers other statutes. And although the derivations of words be conveniently required in the law, and
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in every liberal science, (for *Ignoratis terminis ignoratur & ars*) yet to use the expression of a learned divine, though spoken in another case, *Melius est dubitare de occultis quàm litigare de incertis*; so I must leave you to your own conceit concerning the original of the word *Yeoman*, having only set you down one or two opinions about it: however I must not forget what Sir *Thomas Smith* saith in his *Repub. Anglorum*, who very truly and properly calleth him a *Yeoman*, whom the laws of *England* call *Legalem hominem*, that is, to say, a Freeman born: and Mr. *Lambert* in his *Eirenarcha* will excellently inform you who are, and who are not, *probi & legales homines*. [136]

There is no special, but only a general consideration expressed in the feoffment, neither of which (as I conceive) is in such case absolutely material, (though I may say formal) in regard of the notoriety of deeds of feoffment, &c. for livery and seisin (as shall be said afterwards) is essentially required to make them perfect, which cannot be without the knowledge of others, besides the parties themselves: and a feoffment doth thereby always import a free and willing consent; otherwise, peradventure, it might have happened in a bargain and sale, before 27 *H. 8. cap. 16.* for the better illustration whereof take this example: you and another man agree together, that you shall give him a certain sum of money for a parcel of land, and that he shall make you an assurance of it; you pay him the money, but he maketh you no assurance; in this case, although the state of the land be still in him; nevertheless the equity in *conscientia boni viri* is with you, which equity is called the Use; for which until the 27 *H. 8. cap.*

- [137] *cap. 10.* there was no remedy, (as saith Sir Francis Bacon) and that very truly, except in the court of Chancery; but the same statute conjoineth and annexeth the land and the use together, so you by this means for the consideration have the land itself, without any further conveyance, which is called a Bargain and Sale. But those grave senators and worthy statesmen, who made the said act of the 27 *H. 8. c. 10.* for the transferring of uses into possession, wisely foreseeing that it would be very inconvenient and prejudicious, nay mischievous, that men's possessions should upon such a sudden by the payment of a little money be transported from them, and perhaps in a tavern or ale-house, and upon strainable advantages, did discreetly provide in the same parliament, the said act of 27 *H. 8. cap. 16.* that lands, &c. upon the payment of money as aforesaid, should not pass without a deed indented and inrolled, as by the purport of the same act may appear. Now seeing that before the said act of 27 *H. 8. cap. 16.* lands might pass by bargain and sale upon consideration, without deed indented and inrolled, and might not pass without consideration in such manner: therefore I have heard lawyers say, that consideration is still required in a bargain and sale, though it be by deed indented and inrolled, according to the same statute. Sure I am, that regularly in a deed of feoffment it is not so as formerly is declared, and for the reason before expressed.
- [138]

D E D I S S E.—(*Have given.*)

THE word *Dedi* (by force of an act of parliament made 4 *Ed. 1. c. 4.* commonly called the statute *De Bigamis*) implieth a warranty

ranty to the feoffee and his heirs during the life of the feoffor; whereupon *Fitzherbert* in his *Natura Brevium*, fol. 134. b. puts a case to this effect, viz. If a man give lands to one in fee by deed, by the words *Dedi, Concessi, &c.* hereby he shall be bound to warrant the lands of the feoffee by virtue of those words; and if the feoffee be impleaded, he shall have his writ of *Warrant*. *Chart.* against the feoffor, by reason of the words *Dedi, Concessi, &c.* but not against his heir; for the heir shall not be bound to warranty, except the father bind himself and his heirs to warranty, &c. by express words in the deed. I know some alledge, that because as well the statute as *Fitzherbert* mentions not only *dedi* but *concessi* also; therefore the one without the other implieth no warranty: to whom it may be answered, That the statute itself doth plainly prove against them; for the conclusion thereof hath these words, *Ipse tamen feoffator in vita sua ratione proprii doni sui tenetur warrantizare*; and also the testimony of Sir *Edward Coke* may be produced herein, who affirmeth, that the statute of *Bigamis*, anno 14. *Eliz.* in the court of Common Pleas was expounded, as above is mentioned; namely, that *dedi* did imply the warranty. And Mr. *Perkins*, c. 2. saith, That *dedi* in a deed of feoffment comprehendeth in it a warranty against the feoffor, and so doth not the word *Concessi*.

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CONCESSISSE.—(Have granted.)

I Conceive the word *Concessi* in feoffments and grants, (the implied warranty excepted which *Dedi* creates) to be of the same effect with *Dedi*,
and

and also with *Confirmavi*, especially in some cases : to which purpose hear what *Littleton* speaketh in his chapter of *Discontinuance* : Also (saith he) in some cases, this verb *dedi*, or this verb *concessi*, hath the same effect in substance, and shall enure to the same intent as the verb *confirmavi* : as if I be disseised of a carve of land, and I make such a deed, *Sciant presentes, &c. quod dedi* to the disseisor, *&c.* or *quod concessi* to the said disseisor the said carve, *&c.* and I deliver only the deed to him, without any livery of seisin of the land, this is a good confirmation, and as strong in law as if there had been in the deed this verb *confirmavi, &c.*

L I B E R A S S E.—(*Have delivered.*)

THE word *Liberavi* I take to be of the same nature with *Tradidi*, which I have often seen in feoffments, whereof it is remarkable, that *Hephron* the *Hittite*, when he assured the field of *Machphelah* to *Abraham*, *Gen. 23. 11.* used the word *trado, agrum trado tibi*, that is, to *Abraham*, as *S. Hierom's* translation reads it.

F E O F F A S S E.—(*Have enfeoffed.*)

THIS word cometh from *feudum* or *feodum*, which signifieth Fee ; and is always, or for the most part, used in feoffments, as participating of the same nature.

CONFIRMASSE.—(*Have confirmed.*)

CONCERNING the word *Confirma*, somewhat may be gathered from what hath been spoken about the verb *concessisse*, yet I cannot forget how S. *Hierom* renders the exprestment of the said assurance of the said field of *Machphelah* to *Abraham* for a possession, in these words, *confirmatus est ager*, &c. *Gen.* 23. 17. And now I come to the second thing considerable in the premisses; namely, the Feoffee, whose addition is *Generoso*.

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G E N E R O S O .

GENEROSUS in *English* we read Gentleman; which some derive from the two *French* words *Gentil Home*, denoting such a one is made known by his birth, stock, and race. Sir *Thomas Smith* calleth all those Gentlemen that are above the degree of Yeomen: whence it may be concluded, that every Nobleman may be rightly termed a Gentleman, *sed non vice versa*. Mr. *Cowel* conceiveth the reason of the appellation to grow, because they observe *gentilitatem suam*, the propagation of their blood, by giving or bearing of arms, whereby they are differenced from others, and shew from what family they are descended.

Hæredibus

[142] *Heredibus & Assignatis suis.*—(His heirs and assigns.)

SOME will have an heir so called *quia hæret in hereditate*, or *quia hæret in se hereditas*: but to let such conceits of witty invention pass, it is certain that an heir is so called from the *Latin* word *Hæres*.

Mr. *Littleton* in his chapter of *Fee-Simple* saith, that these words [his Heirs] only make the estate of inheritance in all feoffments and grants, &c. sure then it is necessary for him that purchaseth lands, &c. in fee-simple, to have the feoffment run to himself & *hæredibus suis*; for if it run only to himself & *assignatis suis*, although livery and seisin be made accordingly, and agreeable to the deed; yet thereby only an estate for life shall pass, because there wanteth words of inheritance: and yet without livery and seisin, in the case aforesaid, only an estate at will shall pass. And the reason why the law is so strict in this thing, (as in many others) for to prescribe and appoint such certain words to create and make an estate of inheritance is, (as Mr. *Plowden* saith in his *Commentaries*) for the eschewing and avoiding of incertainty, the very fountain and

[143] spring from whence floweth all manner of confusion and disorder, which the law utterly condemneth and abhorreth. What herein hath been said is to be apprehended and understood of persons in and according to their natural capacities. Yet perhaps an estate of inheritance may sometimes pass in a deed of feoffment by words, which may have reference and will relate to a certainty, for *certum est quod certum reddi potest* :

as

as for example; You enfeoff me and my heirs of a certain piece of land, to hold to me and my heirs, &c. and I re-enfeoff you in as large, ample, and beneficial manner as you enfeoffed me: in this case (they say) you have a Fee-simple for the reason above expressed. So I come next to see, what observations a deed of feoffment further affordeth.

Totam ill. pec. terræ cont.—(All that piece of land containing.)

VERY necessary and convenient it is in deeds of feoffment, &c. to have the lands, &c. thereby intended to be conveyed, certainly and expressly to be set down, as well how much by estimation in quantity they do contain, as the quality of the same, whether meadow, pasture, &c. being the *species* of land, (which is the *genus*) and the place where, and manner how, they exist and lie, the better to shun and avoid doubt and ambiguity, which oftentimes stir up occasions of unkind suits and contentions betwixt party and party. I know that grammarians reading the word *peciam* will be ready to smile; and alledge, that it cannot defend itself in *bello grammaticali*; which I easily confess: but what then? What can they infer from hence? Will they therefore utterly condemn the use thereof? Methinks they should not; but might give lawyers leave to speak in their own dialect. But what if some take exceptions at this word, having occasion to meet with it here, what would they do should they read the volumes of the law, where instead of *bellum* they shall find *guerra*; instead of *sylva*

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they shall find *boscus*, and *sub-boscus*, with a thousand the like? Surely (as saith *Erasmus*) they might commend or else condemn what they could not understand, or haply understanding, might admire from whence such uncouth words should proceed: for their better information (if I thought they would thank me for my labour) I could tell them that because the *Saxons*, *Danes*, and *Normans*, have all had some hand, or at least a finger, in our law: therefore through the commixion of their several languages, it comes to pass, that [145] such difficult terms and harsh *Latin* words (if I may so call them) are frequently obvious in the books and writings of the law. And indeed I see no reason why any man should object or cavil against the usage of such words, though they be not classical, seeing, that as well in the art of logick, as in philosophy, there are found many words, which they call *vocabula artis*, Vocables of Art, which can no better stand, according to the strict rules of grammar, than the ancient words of law, which cannot be changed without much inconvenience.

A C R A.

A C R A, in *English*, an acre, seemeth to come from the *Latin* word *ager*. An acre is taken to be a quantity of land containing forty perches in length, and four in breadth. Mr. *Crompton*, in his *Jurisdiction of Courts*, saith, that a perch is in some places more, and in some places less, according to the different usages in different countries; and so then it must needs be
of

of an acre. But ordinarily, or for the most part, a perch is accounted and esteemed to contain ten foot and an half in length. I take it to be the same with that measure which we call a Rod or Pole. A perch in law *Latin* is called *pertica* or *perticata*. See the ordinance made for measuring of land, *anno* 34 *Ed.* 3. in *Pulton's Abr.* title *Weights and Measures*.

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Q U A R E N T E N A.

Quarentena in *Engl'sh*, a furlong or furrow long. *Firlingus* or *firlingum* is the same. It hath been sometimes accepted and taken for the eighth part of a mile, *anno* 35 *El.* 6. and I have read that *Firlingus* or *Firlingus terræ continet* 32 *acras*. The *Latins* call it *Stadium*.

AB BUT T O.—(*Abutting.*)

AB BUT T O is a verb used by lawyers to shew how the heads of lands do lie, and upon what other lands or places, denoting for the more certainty what lands, &c. are adjacent about the lands, &c. abbuttalled. And now, that I may speak once for all, in regard that lawyers do use to abbreviate their words in writing, the reason is not (as some ignorantly have supposed) because they cannot express their terminations and endings, as they ought to be, but because of the

- [147.] multiplicity of business which they are to go through, oftentimes requiring very sudden dispatch. Yet I could wish that the custom of short writing *alicui scriptori non esset dispendium*; but I fear me too many hereby take occasion to be wilfully ignorant, which otherwise peradventure they would not do.

MILITIS.

- M**ILES, amongst the *Latins*, signifieth a Soldier; and in this place, and the like, *Miles* is to be Englished a Knight, which (as Mr. *Camden* noteth) is derived from the *Saxon* *Gnite* or *Gnight*. The heralds will inform you of divers and sundry orders of knights, if you please to consult with them or their writings thereabouts. A knight at this day is, and anciently hath been, reputed and taken for one, who for his valour and prowess, or other service for the good of the commonwealth performed, hath by the King's Majesty, or his sufficient deputy on that behalf, been as it were lifted up on high, advanced above or separated from the common sort of gentlemen. The *Romans* called knights *Celeres*, and sometimes *Equites*, from the performance of their service upon horseback; and amongst them there was an order of gentility stiled *Ordo Equestris*, but
- [148] distinguished from those they called *Celeres*, as several *Roman* histories do plainly testify. The *Spaniards* call them *Cavellero's*, the *Frenchmen* *Chevaliers*, and the *Germans* *Rieters*; all which

which appellations evidently enough appear to proceed from the horse, which may be some testimony of the manner of the execution of their warlike exercises. And surely it is a very commendable policy in states to dignify well deserving persons with honourable titles, that others may thereby be stirred up to enterprise and undertake heroick acts, and encouraged to the imitation of worthy and renowned virtues.

ARMIGER.

ARMIGER, in *English*, signifieth Esquire, from the *French*, *Escuier*; and perhaps an Esquire may be called *Armiger quasi arma gerens*, from his bearing of arms. Ancient writers and chronologers make mention of some who are called *Armigeri*, whose office was to carry the shield of some nobleman. Mr. *Camden* calls them *Scutiferi*, which seems to import as much, and *homines ad arma dicti*. They are esteemed and accounted of amongst us next in order to knights.

CLERICUS in *English*, we read Clerk. It hath with us two sundry kinds of acceptations: in the first sense it noteth such a one who

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by his practice and course of life doth exercise his pen in any of the King's Majesty's Courts, or elsewhere, making it his calling or profession. Hereupon you shall find in the current of law mention made of divers Clerks: as for example; The Clerk of the Crown, the Clerk of Assize, the Clerk of the Warrants, the Clerk of the Market, the Clerk of the Peace, with many others. In the second sense, it denoteth such a one as belongeth to and is employed about the ministry of the Church, that being his function; in which signification it is to be taken in this place, and in the like: for I, for my part, did never find Clerk in the first sense appropriated to any as an addition simply. We have the use of the word *Clericus* from *Clerus* or *Clericatus*, signifying the Clergy; that is to say, the whole number of those which properly so called, or rather strictly, are *de Clero Domini*, i. e. *hereditate sive sorte Domini*; for *Clerus* cometh from *κληρῶς*, a Greek word signifying the same with *sort* in Latin, namely, a Lot or Portion.

THE office of the *habendum* is to name again the feoffee, and to limit the certainty of the estate; and it may, and doth some time, qualify the general implication of the estate, which by construction and intendment of law passeth in the premises: for an example whereof, see *Buckler's case* in the second book of Sir *Edward Coke's Reports*, and *Throckmorton's case* in *Plowden's*

Plowden's Commentaries. It is to be noted, that the premisses may be enlarged by the *habendum*, but not abridged, as it plainly appeareth as well in the said case of *Throckmorton*, as in *Worteslie's* case reported also by Mr. *Plowden*. And I have read (as my collections tell me) that it is required of the *habendum* to include the premisses. Moreover, the *habendum*, (as *W. N. Esq;* hath it in the Treatise of the Grounds and Maxims of the Law) must not be repugnant to the premisses, for if it be it is void, and the deed will take effect by the premisses, which is very worthy of observation.

THE *tenendum*, before the statute of *Quia emptores terrarum*, made 18 Ed. 1. was usually *de feoffatoribus & hæredibus suis, & non de capitalibus dominis feodorum, &c. viz.* of the feoffors and their heirs, and not of the chief lords of the fee, &c. whereby there happened differs inconveniencies unto lords; as the losing of their escheats or forfeitures, and other rights belonging to them by reason of their seignories, which as the same statute expresseth it, *durum & difficile videbatur, &c.* Whereupon it was granted, provided, and enacted, *Quòd de cætero liceat unicuique libero homini, terras suas seu tenementa sua, seu partem inde ad voluntatem suam vendere, ita tamen quòd feoffatus teneat terram illam seu tenementum illud de capitali domino feodi illius, per eadem servitia & consuetudines per quæ feoffator suus illa prius de eo tenuit. Que estate fuit*

sait (as saith one) *pur l'avantage del seignior*. Which statute was made for the advantage of lords, and indeed I easily believe it. Now it is evident from that which hath been declared out of the said statute, that at this day the *tenendum*, where the fee-simple passeth, must be of the chief lords of the fee, &c. for no man since the

[152] said statute could ever convey lands in fee to hold of himself, out of which rule the King only (I think) may be excepted: and 'tis not in silence to be passed over, that where lands, &c. are conveyed in fee, though there be no *tenendum* at all mentioned, yet the feoffee shall hold the same in such manner as the feoffor held before, *quia factis est legis operatio*, the statute so determines.

The Clause of Warranty, *Et ego & heredes mei, &c. warrantizabimus, &c. defendemus*.—(And I and my heirs, &c. will warrant, &c.)

W*arrantizo* is a verb used in the law, and only appropriated to make a warranty. Mr. Littleton in his chapter of *Warranty*, saith, *Que cest parol, &c.* that this word *warrantizo* maketh the warranty, and is the cause of warranty, and no other word in our law; and the argument to prove his assertion is produced from the form and words used in a fine; as if he should say, Because the word *defendo* is not contained in fines to create a warranty, but the

the word *warrantizo* only; *ergo*, &c. which argument deduced and drawn à *major* ad *minus* is very forcible, for the greater being enabled, needs must the lesser be also enabled; *Omne majus in se continet quod minus est, & quod in majori non valet, nec valet in minori*. But certainly Mr. *Littleton* is to be understood only of an expresse warranty in deed, and of a warranty annexed to lands, for there may be and are other words which will extend and enure sufficiently to warrant chattels, &c. and which will imply a warranty in law; as *dedi*, &c. and *excambium* (as I have heard say) implieth a warranty in law, which from *Glanvil's Vel in excambium, or escambium datione, l. 3. c. 1.* may receive some confirmation. And Mr. *Littleton* in his chapter of *Parteners*, teacheth, that partition implieth a warranty in law, &c. And lest some may hear say, that *defendemus* stands for a cypher, I will tell them what *Bract.* declareth of it speaking about a warranty in deed from the feoffor and his heirs, whose words are these, *Per hoc autem quod dicit (scil. feoffator) defendemus, obligat se & hæredes suos ad defendendum si quis velit servitutem ponere rei datæ contra formam donationis, &c.* Lawyers in their books make mention of three kinds of warranties, *viz.* warranty lineal, warranty collateral, and warranty which commences by disseisin. The first is, when one by deed bindeth both himself and his heirs to warranty, and after death this warranty descendeth to and upon his heir. The second is in a transverse or overthwart line, so that the party on whom the warranty descendeth cannot convey the title which he hath in the land, from him that was the maker of the warranty. The third and last is, where a man unlawfully entreth upon the freehold of another, thereof disseising

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disseising him, and conveyeth it with a warranty; but this last cannot bar at all. Of these you may read plentiful and excellent matters and examples in Mr. *Littleton's* chapter of *Warranty*, and Sir *Edward Coke* learnedly commenting upon him, to whom for further illustration hereof I refer you; as also to Mr. *Cowel's* interpretation of words in the title *Warranty*, who there remembreth divers things very worthy observation concerning it. Before I come to the fifth part of the deed of feoffment, give me leave to observe, that a warranty always descendeth to the heir at the common law, and followeth the estate (as the shadow of the substance) and whensoever the estate may, the warranty may also be defeated, and every warranty (as saith Sir *Edward Coke*) which descends, doth descend to him that is heir to him which made the warranty by the common law.

[155] And moreover it is to be noted, as may be gathered from what hath been formerly said, that an heir shall not be bound to an express warranty, but when the ancestor was bound by the same warranty; for if the ancestor were never bound, the heir shall never be charged. And I remember I have read a case in *Br. Abr.* 35 H. 8. pl. 266. to this purpose; *Si homo dit en son garranty, Et ego tenementa prædicta cum pertinentiis præfato A. B. le donee warrantizabo, & ne dit, ego & hæredes mei il mesme garrantera, mes son heir nest tenuis de garranter, pur ceo que heirs ne sont expresse en le garrante. B. Garr.* 50. So will I forbear to speak any further herein, being a very intricate and abstruse kind of learning, requiring the pen of a cunning and experienced lawyer. And now I address myself to the fifth orderly or formal part of the deed of feoffment, the clause of *In cujus, &c.*

In cujus rei testimonium, &c.—(In witness whereof, &c.)

This clause is added as a preparatory direction to the sealing of the deed: for sealing is essentially required to the perfection thereof, because it doth plainly shew the feoffor's consent to, and approbation of what therein is contained. Hereupon it will not be much devious or out of the way to make some mention of those fashions, which in the manner of sealing and subscribing of deeds, have been anciently used by our ancestors. Some report, that the Saxons in their time (before the Conquest) used to subscribe their names to their deeds, adding the sign of the cross, and setting down in the end the names of certain witnesses, without any kind of sealing at all. But when the Normans came in, as men loving their own country guises, they *per petit & petit*, changed that custom, as also many others which they found here. And Ingulphus, who was made Abbot of Croyland in Anno Domini 1075. seemeth to confirm this opinion in these words, *Normanni cheirographorum consecutionem cum crucibus aureis, & aliis signaculis sacris in Anglia firmari solitam, in cera impressa mutant.* Yet I have read of a sealed charter in England before the conquest, namely, that of S. Ed. made to the Abby of Westminster: yet surely this doth not altogether repugn that which hath been formerly said; for I have seen in Mr. Fabian's Chronicle, and elsewhere, that S. Ed. was educated in Normandy, and 'tis not unlikely but he might in some things incline to their fashions. The Frenchmen have a proverb, *Rome n'a este bastie tout en un jour*, and we in England use

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use the same, namely, *Rome was not built in one day*; so it cannot be conceived that the *Normans* in an instant did alter the *Saxon* custom wholly in this particular, but that it did change by degrees, and perhaps at the first the King had some nigh unto and about him did use the impression of a seal, which I am somewhat persuaded to believe from a certain story which I have heard concerning *Richard de Lucy*, Chief Justice of *England*, who in the time of *H. 2.* is said to have chidden an ordinary man, because he had sealed a deed with a private seal, *quant ceo pertain al Roy & Nobilite solement.* In the days of *Ed. 3.* sealing and seals were very usual amongst all men; for proof whereof I need not produce any other testimony but the deeds themselves, whereof almost every man hath some. But I must remember that *Sir Edward Coke* in the first part of his *Institutes*, (*fol. 7. a.*) seemeth to overthrow the former opinions about the first using of seals in *England*: the sealing of charters and deeds (saith he) is much more ancient than some have imagined; for the charter of King *Edwin*, brother of King *Edgar*, bearing date *Anno Domini 956.* made of the land called *Jecklea* in the isle of *Ely*, was not only sealed with his own seal, (which appeareth by these words) *Ego Edwindus gratiâ Dei totius Britannicæ telluris Rex meum donum proprio sigillo confirmavi*; but also the Bishop of *Winchester* put to his seal, *Ego Elfwimus Winton. Ecclesiæ divinus speculator proprium sigillum impressi.* And the charter of King *Offa*, whereby he gave the *Peter-Pence*, doth yet remain under seal. The either of which two charters are much more ancient than that of *S. Ed.* before mentioned: yet haply there may be some reason probably affirmed why

why as well King *Edwin* and the Bishop of *Winchester*, as *Offa*, who was King of *Mercia* about the year 788, did annex their seals to their charters, which no King of *England*, or Nobleman, did before or after them, (except *S. Ed.*) until the coming in of the Conqueror, that ever I could learn, hear, or read of in any author. Nevertheless I must of necessity leave the search of such reason to others better studied in the commentations and alterations of persons, times, and customs, than I myself: however, I never heard any one deny, but that the frequent use of sealing deeds did commence in the time of *Ed. 3.* and was not ordinarily used amongst private men until then, as hath been formerly touched.

Of the Date *Dat'*.

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IN this clause the stile of the King at large, the year of his reign, and the year of our Lord God, according to the computation and account of the Church of *England*, together with the day of the month, are expressed. In former times, deeds were often made without date, and that of purpose, that they might be alledged within the time of prescription, as Sir *Edward Coke* in his said book of *Institutes*, (*fol. 6.*) very worthily observes: and moreover, that the date of deeds was commonly added in the reign of *Ed. 2.* and *Ed. 3.* and so ever since, to whom I refer you, who in the place last quoted, hath very excellent matter and observations thereabouts. And thus, to perform
what

what I promised, I will speak a word or two concerning LIVERY of SEISIN, and so conclude.

LIVERY OF SEISIN:

[160] **L**IVERY of seisin is a ceremony in law used in the conveyance of an estate of freehold at the least, in lands and other things corporeal: but in a lease for years, at will, &c. livery of seisin is not required, it being only a chattel and no freehold. By livery of seisin, the feoffor doth declare his willingness to part with that whereof he makes the livery, and the feoffees acceptance thereof is thereby made known and manifest. The author of the new terms of the law saith, That it was invented as an open and notorious thing, by means whereof the common people might have knowledge of the passing or alteration of estates from man to man, that thereby they might be the better able to try in whom the right and possession of lands and tenements were if they should be impanelled on juries, or otherwise have to do concerning the same. The usual and common manner in these days of delivering of seisin I know to be so frequent, that of purpose I will omit it: but I pray you note with me before I make an end, that livery of seisin is of two sorts, *viz.* livery of seisin in deed, and livery of seisin in law, which is sometimes termed, livery of seisin within the view. Livery of seisin within the view cannot be good or effectual except the feoffee doth enter into the lands, &c. whereof the livery of seisin was made unto him in the life-time of the feoffor.

And

And it is not to be passed over in silence, that a livery in law may sometimes be perfected by an entry in law; as if a man maketh a deed of feoffment, and delivers seisin within the view, the feoffee dares not enter for fear of death, but claims the same, this shall vest the freehold and inheritance in him, to which effect you may see the opinions of certain justices, 38 *Aff. pl. 23.* upon a verdict of assise in the county of *Dorc.* [161]

And I conceive, that this vesting of a new estate in the said case in the feoffee, making his claim where he dares not enter, stands upon the same reason; for *contrariorum eadem est ratio*, that the revesting of an ancient estate and right in the disseisee doth by such claim, whereof you may read plentifully in Mr. *Littleton's* chapter of *Continual Claim*. It is worth the observation, that no man can constitute another to receive livery for him within the view, nor yet to deliver (as I have heard my Master say); for none can take by force or virtue of a livery in law, but he that taketh the freehold himself, & à contra. Otherwise it is to take and give livery of seisin in deed, for there as well the feoffee in the one case may ordain and make his attorney or attorneys in his name and stead to take livery, as the feoffor in the other case to give livery; *Concurrentibus iis quæ in jure requiruntur*. And now let delivery of the deed be added to the sealing thereof, and the state executing of the lands thereby conveyed, and then I presume none will refuse to allow, that every thing hath been named, which is essentially required to the perfection of a bare deed of feoffment; and although I have mentioned the delivery of the deed in the last place, yet it is not the least thing, or of the least consequence or moment; for after a deed is sealed, if it be not delivered *est a nul* [162]

a nul purpose, it is to no purpose, and the delivery must be by the party himself, or his sufficient warrant. So it may be gathered from what hath been said, that sealing of deeds without delivery is nothing, and that delivery without sealing will make no deed; but that both sealing and delivery must concur and meet together to make perfect deeds.

[163] I hope such as are present at the sealing and delivering of deeds of feoffment, and the state executing thereupon, will not forget to subscribe their names or marks, as witnesses thereof, whereby they may the better be enabled to remember what therein hath been done, if peradventure there shall be occasion to make use of them. And it is not amiss here before I end to observe, that although upon deeds of feoffment, &c. it was not usual before the latter end of *H. 8.* or thereabouts, to indorse or make mention upon such deeds of the sealing and delivering of the deeds, or state executing of the lands, &c. intended thereby to be conveyed, for I myself have many deeds of feoffment which do testify as much; yet it is to be credibly supposed, and not without some manifest probability, that such persons whose names are inserted after a certain clause in such deeds, beginning with *his testibus*, were eyewitnesses of all. Thus desiring you to take notice, that I have called the said six parts of the feoffment Formal; because they are not absolutely of the essence of deeds, &c. *manebo in hoc gyro*, I will here conclude, Requesting all those to whom any right hereof shall or may happen to come, friendly to admonish me of my failings herein, whereby they shall ever engage me thankfully.

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